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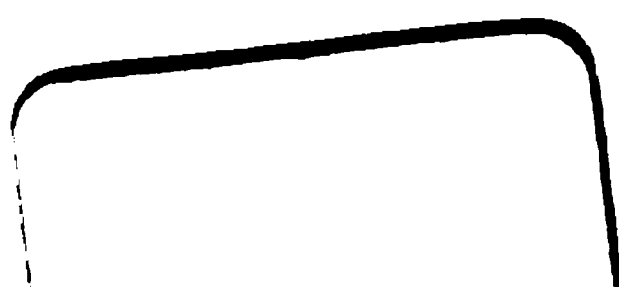
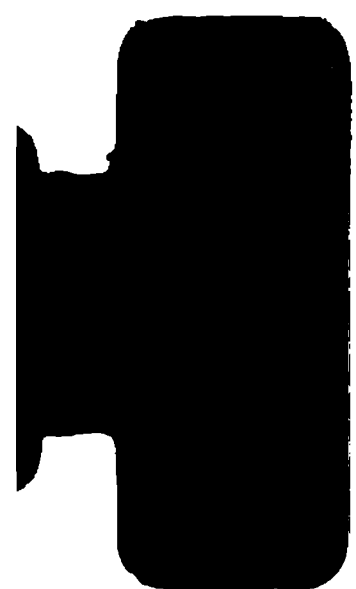
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REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

King's Bench, Common Pleas, & Exchequer,

TOGETHER WITH CASES TRIED ON

The Circuits & at the Old Bailey;

FROM

THE SITTINGS AFTER TRINITY TERM, 1831,

TO THE

SITTINGS AFTER HILARY TERM, 1833.

By F. A. CARRINGTON & J. PAYNE, Esqrs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

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ADDENDUM & CORRIGENDUM.

Page 248. Add to the case of ARDEN v. TUCKER—"The Court of King's Bench afterwards made a rule absolute for entering a verdict for the plaintiff, thereby determining that the action was maintainable."

Page 560, last line but one, for " could insist," read " could not insist."

CASES
AT
NISI PRIUS.

PROMOTIONS.

IN Trinity Vacation, *Philip Williams, Henry William Tancred, Francis Ludlow Holt, and Charles Butler, Esqrs.*, were appointed his Majesty's Counsel learned in the law.

1831.

COURT OF KING'S BENCH.

Sittings at Westminster after Trinity Term, 1831.

BEFORE LORD TENTERDEN, C. J.

M'KONE v. WOOD.

June 14th.

CASE for keeping a dog accustomed to bite mankind.
Plea—General issue.

In an action against a party, for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; if he harbours the dog, or allows it to be at, and resort to, his premises, that is sufficient.

On the part of the plaintiff, it was proved, that the dog had bitten the plaintiff, and that it had bitten two other persons before; but one of the witnesses, who proved that he had made a complaint to the defendant respecting the dog, stated, that the defendant had told him that the dog belonged to a person who had been his servant, but who had left him.

It was also proved, on the part of the plaintiff, that the dog was seen about the defendant's premises, both before and after the time when the plaintiff was bitten.

1831.

M'KONE

v.
WOOD.

Campbell, for the defendant, submitted that there was not sufficient evidence to shew that this was the defendant's dog; but, on the contrary, it was shewn that it was not. He therefore contended that the defendant was not liable in this action.

LORD TENTERDEN, C. J.—It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harbouring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was the defendant's duty, either to have destroyed the dog, or to have sent him away, as soon as he found that he was mischievous.

Verdict for the plaintiff.—Damages 5*l*.

Follett and S. Martin, for the plaintiff.

Campbell, for the defendant.

[Attornies—*J. Humphreys, and E. Young.*]

June 14th.

HIGGINS v. BRETHERTON.

If a person go to a coach-office, and direct that a place be booked for him by a particular coach, and that be done, and he leave his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the

CASE. The *first* and *second* counts of the declaration stated, that the plaintiff had caused a portmanteau, containing deeds, writings, and wearing apparel, to be delivered to the defendant, to be safely and securely kept, and to be redelivered on request; but that the defendant, contrary to his duty, would not redeliver when requested. These counts stated special damage. There was also a count in trover. Plea—General issue.

From the evidence on the part of the plaintiff, it ap-

If the party merely leave the portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all.

peared, that he went to the coach-office of the defendant, in Liverpool, and asked the fare to London by the Express coach; and that, being told 30s., he put down a 30s. Irish note on the counter, which the book-keeper declined taking; that the plaintiff took the note up, asking permission to leave his portmanteau, saying, that he would go by an earlier coach if he could find one, which he did. It was further proved, that the defendant refused to deliver up the portmanteau, unless a sum of 30s. was paid.

1831.
HIGGINS
v.
BRETHERTON.

For the defendant, witnesses were called, who stated that, after taking up the 30s. note, the defendant said, "Book me an outside place on the Express, and I will leave my portmanteau;" and that an outside place was accordingly booked.

LORD TENTERDEN, C. J., (in summing up).—If you believe that the plaintiff said that which has been stated by the defendant's witnesses, I think that it gives him a lien on the plaintiff's portmanteau for something, certainly not for 30s., but for something; and, as the plaintiff has not tendered any thing at all, that would entitle the defendant to a verdict.

Verdict for the plaintiff.

Sir J. Scarlett and *J. Jervis*, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Lucas & P.*, and *Shearman & F.*]

1891.

June 20th.

EAGAR v. DYOTT and HARMAN.

In an action for malicious prosecution against A. and B., if it appear that both A. and B. entered into a joint recognizance to *prosecute* and give evidence, but it also appear that A. only employed the attorney, and that B. attended before the magistrate and the Grand Jury at the request of the attorney, the Judge will direct the acquittal of B.

If C. be entrusted to receive money for A., with a written direction for its application, and C. write a letter to A. stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under the statute 7 & 8 Geo. 4, c. 29, s. 49, not malicious.

MALICIOUS prosecution. The declaration stated that the defendants, without any reasonable or probable cause, indicted the plaintiff. The indictment was set out *verbatim* in the declaration (a); and it charged that the plaintiff being an agent of Mrs. Dyott, she deposited in his hands 200*l.*, with a written direction, signed by her, "with a special purpose specified in the same for the disposition" of the money; and that the plaintiff, contrary to good faith, converted the money to his own use. The declaration then went on to state that the plaintiff was acquitted, and had judgment in his favour.

It appeared that the defendant, Mr. Harman, was a trustee for the other defendant, Mrs. Dyott, and as such had to pay her 800*l.* a-year, which sometimes the plaintiff received for her. To shew a want of probable cause the plaintiff put in a check for 34*l.*, dated after the alleged embezzlement, and before the time of the prosecution. In this check this sum of 34*l.* was stated to be the balance due to Mrs. Dyott. Across this check Mrs. Dyott had written her name. The only evidence to shew that the defendant Harman was a prosecutor of the indictment, was the joint recognizance of the two defendants, entered into before Sir Richard Birnie, who was the committing magistrate; which was a recognizance by both the defendants "to *prosecute*, and give evidence against the plaintiff;" but the magistrate's clerk stated that recognizances were often filled up in a hurry. It was proved by the attorney for the prosecution, that he was employed by Mrs. Dyott, and not by the defendant Harman; and that Mr. Harman

(a) The indictment was on the statute 7 & 8 Geo. 4, c. 29, s. 49, which is set out, *ante*, Vol. 4, p.

49, *n.* See the cases of *Rex v. Prince*, *ante*, Vol. 2, p. 517, and *Rex v. White*, *ante*, Vol. 4, p. 46.

only attended before the magistrate, and before the Grand Jury, at his request.

1831.
EAGAR
v.
DYOTT.

Sir *J. Scarlett*, for the defendant Harman.—I submit that my client ought to be acquitted. He was only a witness, and was compelled to attend to give his evidence. He neither employed the attorney, nor had he any interest in the prosecution.

Lord TENTERDEN, C. J.—I think on this evidence that I ought to direct an acquittal of the defendant Harman. I know that these recognizances are often drawn up in a hurry.

To shew probable cause, Mr. Harman was called for the defence. He stated that he had paid a sum of money to the plaintiff on account of Mrs. Dyott; and a letter from the plaintiff to Mrs. Dyott, of a subsequent date, was put in, by which he informed her that he had not received this sum of money.

Lord TENTERDEN, C. J.—It being shewn that the plaintiff denied the receipt of money, which it is proved that he had received, I think I ought to nonsuit. That appears to me to be sufficient evidence of probable cause.

Nonsuit.

The plaintiff in person.

F. Pollock and *Capron*, for the defendant Mrs. Dyott.

Sir *J. Scarlett* and *Follett*, for the defendant Harman.

[Attornies—*W. Archer*, and *Beetham*, and *J. W. Freshfield*.]

In the ensuing term, the plaintiff moved to set aside the nonsuit, but the Court refused a rule.

1831.

*Adjourned Sittings in London, after Trinity
Term, 1831.*

BEFORE LORD TENTERDEN, C. J.

HILLARY v. MORRIS.

June 30th.

A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bargain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. A. upon this brought an action in his own name:—*Held*, that he was not entitled to recover.

ASSUMPSIT to recover commission as an agent on the sale of the defendant's business of a wine merchant.

It appeared that, in consequence of a letter written by the plaintiff to the defendant, informing him that he should be able to procure a friend of his to become the purchaser of the business, a letter was written in answer by the defendant's authority, containing the particulars of the business, the quantities of stock, the value of the trade, &c. This letter was written for the purpose of being shewn to the plaintiff's friend, but contained an inclosure marked private, which was in these words:—"If the sale is completed, I shall be happy to give you a liberal sum upon the premium." The plaintiff became a bankrupt after he had introduced the purchaser, but before the bargain was finally concluded; and his assignees brought an action for the commission. After a time, however, they discontinued the action, paid the costs to the defendant, and wrote to the plaintiff, saying that they disclaimed all right to the money. The plaintiff had not obtained his certificate.

Sir *J. Scarlett* and *Steer*, for the defendant, contended that the plaintiff's bankruptcy was an answer to the action, as, after the transfer of his rights to his assignees, he could not have any title to sue.

Campbell and *R. V. Richards*, for the plaintiff, replied that the disclaimer of the assignees left the plaintiff at liberty to sue in his own right; and that, as the whole of the

work had not been done at the time of the action by the assignees, the bankrupt might at least maintain *assumpsit* for his work and labour for the part which occurred subsequent to the bankruptcy, although he had not obtained his certificate.

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HILLARY
v.
MORRIS.

LORD TENTERDEN, C. J.—I am clearly of opinion that the assignees had no right to transfer the claim in question to the bankrupt or to any body else. The debt was part of the bankrupt's estate, which they were bound to get in for the benefit of the creditors. The bankrupt could only recover for introducing the purchaser, he having nothing to do with the valuation; and, although he could not recover any thing till the matter was complete, yet, when it was complete, the cause of action would refer back to the time when the work was done, and that was before the bankruptcy. The assignees, therefore, were the parties entitled to sue, and they have renounced their right. I am of opinion that the plaintiff must be called.

Nonsuit.

Campbell and *R. V. Richards*, for the plaintiff.

Sir J. Scarlett and *Steer*, for the defendant.

[Attornies—*W. B. Ogden*, and *Reynolds*.]

1831.

BEFORE MR. JUSTICE PATTESON,

*(Who sat for the Lord Chief Justice.)**July 1st.*

BARFORD v. NELSON.

Practice as to
certificates for
execution, under
the statute 1 W.
4, c. 7, s. 2.

CASE for an injury occasioned by the negligent driving of a coach, called the Leeds Courier, of which the defendant was proprietor, to a cart belonging to the plaintiff.

The case was one of contradictory evidence, and the Jury, after retiring for a considerable time, found a verdict for the plaintiff.

Curwood, upon this applied to PATTESON, J., for a certificate, to entitle the plaintiff to immediate execution.

F. Pollock, for the defendant, said that Lord *Tenterden* had laid down a rule, that, if there was a reasonable ground of defence, the case should take the ordinary course of the law; and that he understood that Lord *Lyndhurst* had, in the Court of Exchequer, laid down a similar rule; and he submitted that, according to those rules, the present case, about which the Jury had so long deliberated, was not one in which the certificate should be given.

PATTESON, J.—As I am informed that Lord *Tenterden* has laid down a particular rule, I should be desirous to act, and I will act here, upon that rule. I think it is for the Judge at the time to decide the matter, as the words of the act are—“ that, in his opinion, execution ought to issue,” &c. And in this case I should say, that it is one in which there ought to be instant execution, as it was clearly a question for the Jury, and there can be no possibility of disturbing the verdict hereafter. I think that the plaintiff

ought to have the fruits of his verdict at once; but I will communicate with Lord *Tenterden* on the subject.

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BARFORD
v.
NELSON.

Campbell and *Curwood*, for the plaintiff.

F. Pollock and *Holt*, for the defendant.

[Attornies—*C. E. Reynolds*, and *Pritchard*.]

We are informed by Mr. *Bellamy* that no certificate was granted.

In the case of *Wright v. Guiver*, which was also an action for negligent driving, tried before Lord *Lyndhurst*, in the Exchequer, on the 20th of June, *Bompas*, Serjt., for the plaintiff, asked for execution at any time his Lordship pleased in the course of the vacation. *Andrews*, Serjt., for the defendant, submitted that the act of Parliament was not intended to apply to cases of this description. Lord *Lyndhurst*, C. B., refused to grant the application, being of opinion that it was not a case in which there should be any departure from the usual course.

In the case of *Crookshank v. Rose*, post, p. 19, which was an action on a bill and a note, given for a public house score, to which the defence was, that part of the demand was illegal under the sta-

tute 24 Geo. 2, c. 40, being for spirits; Lord *Tenterden* refused to certify, saying, that he did not think it a case for execution before the ordinary time.

In the case of *Hambidge v. Crawley*, (C. P., June 29, 1831), which was an action for criminal conversation, the plaintiff, to prevent a verdict passing against him in consequence of the prevarication of one of his witnesses, consented to be nonsuited; and *Tindal*, C. J., on the application of *Wilde*, Serjt., after hearing *Payne*, for the plaintiff, in the absence of *Storks*, Serjt., and after taking time to consider, directed execution to issue at the expiration of a month.

The following cases from the Oxford Circuit, being on this subject, we have subjoined them here—

1881.

WORCESTER ASSIZES, 1831.—*Coram PARK, J.**July 20th.*

WARD v. CROCKET.

DEBT for the price of certain windows sold by the plaintiff to the defendant.

There was a verdict for the plaintiff.

Godson applied for a certificate to entitle the plaintiff to immediate execution.

Mr. Justice PARK.—I shall not allow immediate execution to issue. The action is in debt, and the defendant is obliged to plead, and come to trial, or the plaintiff might sign final judgment without any writ of inquiry, or proof of the amount of his debt. Lord *Tenterden* does not grant any certificate if the action is in debt.

Certificate refused.

Godson and ———, for the plaintiff.

R. V. Richards, for the defendant.

[*Attornies—Holdsworth*, and ———.]

STAFFORD ASSIZES, 1831.—*Coram PATERSON, J.**July 25th.*

BELL v. SMITH.

ASSUMPSIT on promissory notes. Plea—General issue.

There was a verdict for the plaintiff.

Russell, Serjt., applied for a certificate to entitle the plaintiff to immediate execution.

Greaves, for the defendant.—I am in a condition to prove that the writ in this case was issued before the statute of 1 W. 4, c. 7, passed; and I submit that that statute only applies to actions commenced after its passing. The word “brought” of itself is equivocal; but, coupled with the words “may be,” its operation is clearly future. In this act of

Parliament the word "may" is always so used, and, in some instances, is accompanied by the word "shall."

Mr. *Bellamy* said, that Lord *Tenterden*, C.J., had granted certificates immediately after the passing of the act.

Mr. Justice *PATTERSON*.—I entertain no doubt about it.

Certificate granted.

Russell, Serjt., and *R. V. Richards*, for the plaintiff.

Greaves, for the defendant.

[Attornies—*A. Flint*, and *Johnson & W.*]

By the statute 1 W. 4, c. 7, s. 2, which was passed on the 11th of March, 1831, it is enacted, "That, in all actions brought in either of the said Courts, by whatever form of process the same may be commenced, it shall be lawful for the Judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject, or not, to any condition or qualification, and in

case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed, although the writ of *distringas juratores* or *habeas corpora juratorum* may not be returnable until after such day: Provided always, that it shall be lawful for the party entitled to such judgment to postpone the signing thereof."

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BELL

v.
SMITH.

1831.

July 1st.

WELLS v. FLETCHER.

Persons who cohabit as man and wife, after a marriage *de facto*, supposed by both to be a good marriage in law, may, after the marriage is found to be a nullity, give in evidence, in a Court of justice, statements made by each other during the cohabitation.

ASSUMPSIT to recover a sum of 14*l.*, for work and labour as a haymaker.

For the purpose of shewing that the plaintiff was a person in a superior station of life to that of a labourer, and that, at the time of the work and labour in question, he did not look for payment for what he did, a female witness was called on the part of the defendant. On her examination on the *voire dire*, by *F. Pollock*, for the plaintiff, she said that she had been married to the plaintiff, at St. Pancras Church, by banns.

Sir *J. Scarlett*, for the defendant, asked her, whether she had not since been divorced.

F. Pollock, objected, that, after proof of a marriage *de facto*, a woman could not, on the *voire dire*, shew that she was unmarried; as, without the sentence of divorce, it was impossible to tell, whether the divorce was a *vinculo matrimonii*, or only a *mensa et thoro*.

Sir *J. Scarlett*,—On the *voire dire*, a witness, who has disqualified himself by his statements, is at liberty to set himself right by his statements, without the production of any documents.

The witness said, that she was married to a person named Duke; but, not seeing him for thirty years, she thought he was dead, and therefore married the plaintiff; but she afterwards found that Duke was still living.

PATTESON, J.—There was no occasion for any divorce in this case; the second marriage is a mere nullity. Whatever doubt there may be as to the question—"Were you divorced?" unquestionably, in this view of the case, the

marriage is got rid of. I should be inclined to think, that the other question might be put, but there is no doubt that this may.

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WELLS
v.
FLETCHER.

The witness was then examined, and was proceeding to state something which the plaintiff had said while she was living with him.

F. Pollock, objected, that what occurred while they were living together as man and wife was protected, and could not be received against the plaintiff.

PATTERSON, J.—I think, now the connection is dissolved, it may be given in evidence.

The evidence was then received, and a verdict was eventually found for the defendant.

F. Pollock and *R. V. Richards*, for the plaintiff.

Sir J. Scarlett and *Wallinger*, for the defendant.

[Attornies—*W. S. Paterson*, and *J. H. Webber*.]

See the cases of *Batthews v. Galindo*, Vol. 3 of these Reports, p. 238, S. C. 1 M. & P. 565, and *Hawkings v. Inwood*, Vol. 4, p. 148.

CLENDON v. DINNEFORD.

July 1st.

THE first count of the declaration stated, in substance, that the plaintiff was paying his addresses to a certain A., who was paying his addresses to a lady, lost her letters and two memorandum books containing remarks of his own; B. found them, and kept them, on the ground that the books contained matter injurious to him, and also shewed them to others: A. sent a person to demand them of B., who, at first, refused to give them up at all; but, before the person left, said he would not give them to him, but would to C. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying that he made a sacrifice to obtain the letters:—*Held*, that there was a conversion of the whole; but the verdict was only for nominal damages.

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lady, and lost certain letters written to him by her, which came to the defendant's possession, who shewed them to other persons, and converted them to his own use; in consequence of which conduct on the part of the defendant, the match was broken off. The *second* count was nearly similar. The *third* count was a count in trover for certain letters and memorandum books. There was a count for a libel in a letter written to the father of the lady in question; and also several counts for words uttered to various persons, the lady's father not being one. These words were not actionable in themselves; and the only special damage stated in the declaration was, the breaking off of the match with the lady. Plea—Not guilty.

The plaintiff and defendant were both, up to the month of July, 1830, assistants to a gentleman named Tebbs, a chemist and druggist, carrying on business in Bond Street. At that time the plaintiff quitted, and went down to his parents, who resided at Deal, in Kent. For some time previously, the plaintiff and defendant had not been upon very good terms, each being desirous of obtaining the business of their employer, who was about to retire. Two or three days after the plaintiff had left, the defendant told Mr. Tebbs that he had found some letters and memorandum books, which the plaintiff had left behind him, in which he had written abusive things of him (Mr. Tebbs). The defendant held the papers, &c., in his hand, and wished Mr. Tebbs to look at them; but he declined. The defendant said he should keep them, as they were of some consequence to his character. The letters were those of a young lady residing at Deal, to whom the plaintiff had been for some time paying his addresses; and the books, which were two in number, contained copies of his answers to them, and other observations. The defendant shewed them to several other persons besides Mr. Tebbs. In the month of September, 1830, a person named Hannah, went to the defendant, by the plaintiff's authority, and demanded the letters and the two memorandum books.

The defendant at first refused to deliver them at all; but, as Mr. Hannah was leaving, he said that he would not deliver them to him; but, if either Mr. Fenton or Mr. Chitty would call, he would deliver them up. In consequence of this, Mr. Chitty, who was the plaintiff's brother-in-law, went, and the defendant offered to deliver up the lady's letters and one of the books, saying, that he should keep the other book for his own justification, as it contained observations injurious to him. Mr. Chitty said that he could not take a part only, without consulting the plaintiff. He did accordingly consult the plaintiff, who authorized him to receive the part offered, as he thought it right to make some sacrifice to obtain the lady's letters. The letters and one book were therefore delivered up to Mr. Chitty's order. It appeared that the defendant said in his conversation with Mr. Hannah, that he should write to the friends of the young lady at Deal, and would "take devilish good care to break off the connection in that quarter."

The lady's father was called as a witness for the plaintiff, and stated, that, while the plaintiff was paying his addresses to his daughter, he received several anonymous letters in July and August; and, about the 14th of September, he received a letter signed with the defendant's name; after which he admitted that he broke off the connection, but denied that the contents of the letter influenced him in his conduct. He added, that he came to London, and had a conversation with the defendant, who spoke as a man who had been injured by the plaintiff; but he stated, that the conversation had no direct influence upon his mind, so as to induce him to break off the match; though it did induce him to hasten the communication of his resolution, which had been previously formed. It appeared, that he did not call upon the plaintiff for any explanation; but, on the contrary, when the plaintiff called upon him, refused to tell him anything that had taken place.

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The match was broken off by a letter written to the plaintiff by the lady's father, in which, after stating some pecuniary liabilities under which the plaintiff was, as the chief reason, he desired the restoration of his daughter's letters, stating that she was indignant at finding that they had been so carelessly kept, as to have been shewn about by the defendant in London.

The letter from the defendant, complained of as the libel, was read; but, from the plaintiff's attorney not having been able to obtain any copy, it was not set out at all correctly in the declaration.

Sir *J. Scarlett*, upon this, contended that no part of the declaration was proved; and, therefore, that the plaintiff must be nonsuited.

PATTESON, J., intimated that the case must at least go to the Jury with respect to the book which had not been returned.

Sir *J. Scarlett*.—The plaintiff cannot maintain trover for that book, without proving a fresh demand of it, as he consented to receive the other papers without it.

Denman, A. G.—There is sufficient evidence of a conversion long before. Any improper keeping and using of books which had been improperly obtained, is a conversion. But, supposing him to hold them merely as a trustee, he was bound to deliver them up when they were demanded; he had no right to make such a condition as has been proved; the consent of the plaintiff, if obtained at all, was an extorted consent.

Kelly, on the same side.—The law is, that, if the conversion is at any one time complete, what happens afterwards does not destroy the right of action, it only makes

a difference in the damages. And the finding, (knowing there was no right to use), and keeping, reading, and communicating to others, is a clear conversion.

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PATTESON, J.—I do not think it will be disputed that an actual conversion cannot be purged. I think the shewing of the letters is not a conversion; and it really is brought to the question, whether the plaintiff waived the delivery of the second book.

Kelly.—There had been two refusals before.

Sir *J. Scarlett*.—The defendant only says he will not give them to Hannah, but expresses his willingness to deliver them to Chitty or Fenton. This is not evidence of an intention to keep them, and convert them to his own use.

PATTESON, J.—As far as I remember the cases, I think the refusal to deliver to one person, though accompanied by a declaration of willingness to deliver to another, is a conversion. I speak with hesitation; but that is my impression. I think there was a case in which a horse was, after detention, returned in as good a condition as it was in at first, and yet it was held to be a conversion (*a*). I think it must go to the Jury, for them to say whether the whole amounts to a conversion (*a*). It will only affect the damages. No special damage has been proved; for the only special damage is the loss of the marriage, and that does not appear to have been occasioned by the defendant's conduct.

Denman, A. G.—The acceleration of the communication by the lady's father to the plaintiff, of his resolution to break off the match, is sufficient proof of the special dam-

(*a*) See *Mackinson v. Rawlinson*, 9 Price, 460.

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age. Besides, his letter states that his daughter was indignant at her letters having been shewn about.

Sir *J. Scarlett* then addressed the Jury, and contended that there was no conversion proved.

PATTESON, J., in summing up, said—The special damage is not proved. The libel is not proved. The slander is not proved, for the words are not actionable in themselves, and the special damage is not proved to have been the consequence of them. It is therefore reduced to this question, what are the damages to be recovered in consequence of the conversion. I am of opinion that there is a conversion proved; therefore, the question is only as to the damages. We can hardly tell the value of the books, nor what damages ought to be given in the case; because there has been a delivery of the letters and one book, and a waiver of the delivery of the other. I should say, under these circumstances, that the plaintiff is entitled to nominal damages only. But it is for you to say whether you agree with me as to the amount. You will find what damages you think proper.

Verdict for the plaintiff, damages 1s. on the count in trover. And for the defendant on the other counts, with leave to move for a nonsuit (a).

Denman, A. G., and *Kelly*, for the plaintiff.

Sir *J. Scarlett* and *Platt*, for the defendant.

[Attornies—*Randall*, and *Brutton & Clipperton*].

(a) No motion was made.

1831.

BEFORE LORD TENTERDEN, C. J.

CROOKSHANK v. ROSE.

July 2nd.

ASSUMPSIT on a promissory note for 10*l.* 3*s.* 6*d.* made by the defendant, payable on demand, and a bill of exchange for 10*l.* 7*s.*, drawn by the plaintiff and accepted by the defendant, payable at eighty-one days from the date.

It appeared that the defendant, who was a seafaring man, lodged at a public house, which was kept by the plaintiff, and the bill and note were given at the same time for the defendant's score, amounting to 20*l.* 10*s.* 6*d.*, being partly for board and lodging, and partly for spirituous liquors consumed by him in the public room; but the witness who proved it, said, that the demand for those liquors did not equal the amount either of the bill or the note. Small sums had been paid at different times on account.

Campbell, for the defendant, contended, on the authority of *Scott v. Gilmore* (a), that the plaintiff could not recover.

LORD TENTERDEN, C. J.—It is quite clear that some part of the consideration is for spirits, but not to the full amount of either of the securities. Therefore, it seems to me, that the plaintiff may recover on one of them.

Campbell.—I submit, that, as they were given at one time, for one account, they are both bad.

LORD TENTERDEN, C. J.—You may just as well say

(a) 3 Taunt. 226; cited *ante*, Vol. 4, p. 368, in a note to *Owens v. Porter*, which see.

A publican took from a person, who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account:—*Held*, in an action on the securities, that, although they were given at the same time, the plaintiff might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered, in consequence of the act of the 24 Geo. 2, c. 40.

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that they are both good; you have no more right to say the one than the other; but money has been paid on account.

Campbell.—The money paid must be applied to a legal debt.

Lord TENTERDEN, C. J.—They may apply it to what part they please; may they not apply the cash to that which the act says they shall not recover?

Campbell.—I submit that it is not a legal debt.

Talfourd, for the plaintiff.—The act of Parliament says only that the party shall not recover—it does not avoid the debt.

Lord TENTERDEN, C. J.—The act does not avoid the security, but the authority cited goes to that extent. I think that, if the plaintiff takes a verdict for the amount of one of the securities, it will be right.

Campbell assented to this, and the plaintiff had a verdict for 10*l.* 7*s.*

Talfourd applied for immediate execution.

Lord TENTERDEN, C. J., refused, saying that he did not think it a case in which he ought to give it.

Talfourd, for the plaintiff.

Campbell, for the defendant.

[Attornies—*J. Pattison*, and *Shearman & F.*]

1831.

BROCKELBANK v. SUGRUE (a).

July 4th.

THIS was an action against the defendant, as a member of the St. Patrick's Insurance Company, on two policies of insurance, the one on the ship *Hebe*, the other on her freight. The original policy on the ship was, at and from Liverpool to Quebec, during the ship's stay and loading there, and thence back to her port of discharge in the United Kingdom. The policy was dated June 30th, 1825. On the back of this policy the following memorandum, dated August 26th, 1825, was indorsed—"The *Hebe* being unavoidably detained beyond the intended time of sailing to Quebec, the voyage is changed, and the vessel proceeds from Liverpool to St. John's, New Brunswick, and at and from thence back to London; and, in consideration of one guinea *per cent.* additional, the company agreed to continue on the risk until the vessel should be arrived back in London, or her port of discharge in the United Kingdom." This memorandum was signed by Mr. Stewart.

To prove his authority as an agent for the company, Mr. Mackey was called. He said, "Mr. Stewart signed for the company; we did not send policies to Ireland, to have such an alteration as this made in them. I have known losses paid on policies having such alterations signed by Mr. Stewart, without being sent to Ireland."

Sir *J. Scarlett*.—Those policies ought to be produced.

Lord TENTERDEN, C. J.—I think not; we do not want the contents of the particular policies. The witness is only asked as to the course of dealing.

(a) This was a second trial of the case reported in 1 Barn. & Ad. 81, where it was held, that the memorandum indorsed on the policy in this case did not require a new stamp.

A memorandum indorsed on a ship's policy of insurance, for a change of voyage, was signed by an agent of the insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the company:—*Held*, that this was sufficient proof of the agent's authority to sign such memorandums; and that the other policies, on which such memorandums had been signed, need not be produced.

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Mr. Mackey, in his cross-examination, said: "Proposals for policies were made to the agent in London. The proposals were sent to Dublin, and, if approved, a policy was returned, and handed to the assured. When the agent made an alteration, he always advised the company of it." In re-examination, Mr. Mackey stated, that such alterations as the one in question were made very frequently.

Sir *J. Scarlett*.—I must object to the reading of this memorandum. An agent for receiving proposals has nothing in his agency which can authorize him to make a new policy on the back of the old one; and, if it is to be said that in this case there was such an authority, it must be strictly proved. The very nature of the agency proved shews that Mr. Stewart never was the general agent of the company, as he was to send the proposals to Dublin.

Lord TENTERDEN, C. J.—Taking the whole of the evidence, there is proof of an agency for the purpose of making such alterations as this. If, when the company were informed of the alteration, they had disapproved of it, perhaps they might have repudiated it.

The memorandum was read.

The cause was referred.

F. Pollock and *Follett*, for the plaintiff.

Sir *J. Scarlett* and *Campbell*, for the defendant.

[Attornies—*Clutton & Co.*, and *Oliverion & Co.*]

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*Sittings at Westminster after Michaelmas Term,
1831.*

—
REX v. MOODY.

Nov. 26th.

INDICTMENT for perjury by an insolvent debtor. The indictment stated the petition of the defendant for his discharge, and the other proceedings in the Insolvent Debtors' Court; and that the defendant did make affidavit in writing, that the contents of his schedule were true; whereas in truth and in fact the contents of his schedule were not true, as several debts due to him (which were specified) were not included in it (a).

An insolvent debtor, omitting to state in his schedule debts due to him, is not indictable for perjury, although he has sworn to the truth of his schedule; but he must be indicted for a misdemeanor, under sect. 70 of the insol-

vent debtors' act, 7 Geo. 4, c. 57. Perjury under sect. 71 of that act, is only committed as to things falsely *stated* in the schedule.

The form of oath at the end of an insolvent's schedule is an affidavit in writing, and may be so stated in an indictment for perjury.

Debts due to the insolvent are "effects or property," within sect. 70 of the insolvent debtors' act.

(a) Although it was held that the omission of debts is not perjury within the 71st section of the insolvent debtors' act, yet, as the form of the indictment would be useful in drawing an indictment for the misdemeanor under sect. 70 of the act, we have subjoined it. It would be also useful in the drawing of any pleading in which it might be necessary to state the proceedings in the insolvent debtors' court. It was as follows:—

Middlesex, to wit—The jurors for our lord the king upon their oath present, that heretofore and after the passing of an act of Parliament made and passed in the seventh year of the reign of our late sovereign lord George the

Fourth, intituled "An Act to amend and consolidate the laws for the relief of insolvent debtors in England," to wit, on the 31st day of May, in the seventh year of the reign of our said late lord George the Fourth, by the grace of God of the united kingdom of Great Britain and Ireland then king, defender of the faith, John Doble Moody, late of the parish of Saint Clement Danes, in the county of Middlesex, surgeon, being then a prisoner in actual custody within the walls of a certain prison in England (to wit, in the debtors' prison in Whitecross Street, in the city of London), to wit, at the parish aforesaid, in the county of Middlesex, upon process for debt, did, within the space

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The defendant's petition and schedule, filed in the Insolvent Debtors' Court, were put in, and his signature wa

of fourteen days next after the commencement of such his actual custody, apply, by petition, in a summary way, to the Court for the relief of insolvent debtors in the said act of Parliament mentioned, and thereby petitioned for his discharge from such custody according to the provisions of the said act of Parliament, which said petition was then duly subscribed by the said John Doble Moody, then and there being such prisoner as aforesaid, and filed in the said Court, to wit, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, and that afterwards, and within a certain time, to wit, twenty days after the said petition was so filed as aforesaid, to wit, on the 20th day of June, in the seventh year aforesaid, the said day and time having been then and there by the said Court thought reasonable in that behalf, the said John Doble Moody then and there being and continuing such prisoner as aforesaid, did, pursuant to the said act of Parliament, to wit, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, deliver into the said Court a schedule, intituled, the schedule of John Doble Moody, late of 91, Piccadilly, and of Osnaburg Row, Pimlico, both in Middlesex, surgeon and apothecary and musical instrument maker (meaning himself, the said John Doble Moody), and in and by which said schedule it was then and there stated and declared by the said John Doble

Moody, amongst other things, that the said schedule then and there contained a full, true, and perfect account of all debts at the time of presenting the said petition owing to him the said John Doble Moody, or to any person or persons in trust for him or for his benefit or advantage, either solely or jointly with any other person or persons, and the names and places of abode of the several persons from whom such debts were due or owing, and of the witnesses who could prove such debts, so far as he the said John Doble Moody could set forth the same; which said schedule was then and there subscribed by the said John Doble Moody, then and there being and continuing such prisoner as aforesaid, and was then and there forthwith filed in the said Court: and the jurors aforesaid, upon their oath aforesaid, present that the said matters and things so stated and declared in and by the said schedule as aforesaid, then and there were material to a due and right adjudication upon the said petition and schedule of the said John Doble Moody by the said Court: and the jurors aforesaid, upon their oath aforesaid, further present that afterwards, to wit, on the 28th day of July, in the seventh year aforesaid, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, the said petition being then and there so filed, and the said schedule so then and there delivered into and filed in the

proved to the following words at the end of the schedule:

"I, John Doble Moody, do hereby swear, that the con-

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said Court as aforesaid, the said John Doble Moody then and there being and continuing such prisoner as aforesaid, and contriving and intending to deceive and impose upon the said Court, and to cheat and defraud divers persons then and there being creditors of him the said John Doble Moody, and to obtain his the said John Doble Moody's discharge out of the custody in which he then and there was as aforesaid, came in his own proper person before Henry Revell Reynolds, Esq., John Greathed Harris, Esq., Thomas Barton Bowen, Esq., and William John Law, Esq., then and there being respectively commissioners of the said Court, to wit, at the Court-house in Portugal Street, Lincoln's Inn Fields, at the parish of Saint Clement Danes, in the said county of Middlesex, the time and place last aforesaid having been in due manner appointed by the said Court for the hearing of the matters of the said petition and schedule, and the said John Doble Moody then and there in due form of law was sworn, and did take his corporal oath upon the holy gospel of God, before the said Henry Revell Reynolds, John Greathed Harris, Thomas Barton Bowen, and William John Law, touching and concerning the truth of the matters contained in the said petition and schedule, the said Henry Revell Reynolds, John Greathed Harris, Thomas Barton Bowen and William John Law, then and there being respectively such com-

missioners as aforesaid, acting under the powers of the said act of Parliament, and then and there having sufficient and competent authority to administer an oath to the said John Doble Moody in that behalf; and that the said John Doble Moody being so sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there, upon his oath aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly did say, depose, swear, and make affidavit in writing, that the contents of his the said John Doble Moody's said petition filed in the said Court, and also of his said schedule, and of all and every part thereof respectively, were true; whereas, in truth and in fact, the contents of the said schedule, and of all and every part thereof, were not then and there true; and whereas, in truth and in fact, the said schedule did not then and there contain a full, true, and perfect account of all debts at the time of presenting the said petition owing to the said John Doble Moody, or to any person or persons in trust for him or for his benefit or advantage, nor did the said schedule then and there contain the names and places of abode of the several persons from whom such debts were due or owing, and of the witnesses who could prove such debts, so far as he the said John Doble Moody could set forth the same, as the said John Doble Moody, at the

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tents of my petition, filed in this honourable court, and also of this my schedule, and of all and every part thereof respectively, are true. So help me God."

time of his so swearing and making affidavit as aforesaid, well knew, (to wit) at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex; and whereas, in truth and in fact, at the time of presenting the said petition, there had been and then were divers debts owing to the said John Doble Moody, and for his benefit and advantage, (to wit) a certain debt and sum of 11*l.* 2*s.* 1*d.* from Ulysses Bagenal, Lord Downes, a certain debt and sum of 2*l.* 19*s.* from one Sarah Vickers, a certain debt and sum of 2*l.* 4*s.* 6*d.* from one Thomas Ashmore, a certain debt and sum of 1*l.* 3*s.* 6*d.* from one Benjamin Keene, a certain debt and sum of 4*l.* 4*s.* 6*d.* from one Eliza Lucy Vestris; a certain debt and sum of 7*l.* 4*s.* 6*d.* from Granville Somerset; a certain debt and sum of 1*l.* 7*s.* from one Charles Wyndham; a certain debt and sum of 2*l.* 10*s.* from one Madame Cossagne; a certain debt and sum of 6*l.* 16*s.* from one John Prosser; and a certain debt and sum of 7*l.* 0*s.* 6*d.* from one Edward William Lake, all which said several last-mentioned debts and sums of money, and the names and places of ahode of the said respective persons from whom the same then and there had been and were due and owing as aforesaid, were, at the time when the said John Doble Moody so swore and made affidavit as aforesaid, omitted and not contained in the said schedule, and could and might at

the said last-mentioned time have been set forth in the same by the said John Doble Moody, (to wit) at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, as the said John Doble Moody, at the time of his so swearing and making affidavit as aforesaid, well knew, (to wit) at the said parish of Saint Clement Danes, in the county of Middlesex aforesaid: and so the jurors aforesaid, upon their oath aforesaid, do say that the said John Doble Moody, on the said 28th day of July, in the seventh year aforesaid, at the parish of Saint Clement Danes aforesaid, in the said county of Middlesex, before the said Henry Revell Reynolds, John Greathed Harris, Thomas Barton Bowen, and William John Law, so as aforesaid having sufficient and competent authority to administer the said oath to the said John Doble Moody, falsely, maliciously, wickedly, and wilfully, by his own act and consent, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great displeasure of almighty God, in contempt of our said lord George the Fourth, the then king, and his laws, to the great damage of the said creditors of the said John Doble Moody, against the form of the statute in such case made and provided, and against the peace of our said lord George the Fourth, the then king, his crown and dignity.

In an indictment for the mis-

It was also proved that the words "by the Court," written under the jurat, were of the handwriting of the chief clerk of the Insolvent Debtors' Court.

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demeanor under sect. 70 of the insolvent debtors' act (set out *post*, p. 29), if the party were charged with omitting debts due to him, it would be proper to specify those debts in the indictment, as, if they were not stated, the indictment would be open to an objection, founded on the same reasons as those on which the decision proceeded in the case of *Rex v. Hepper*, *ante*, Vol. 1, p. 608.

In the case of *Rex v. Bradbury*, which was tried before Mr. Justice Gaselee, at the Warwick Summer Assizes, 1830, in which Mr. Hill was for the prosecution, and Mr. Amos for the defence, the defendant was convicted and had judgment against him on the following count, which was the third count of the indictment, the other counts failing: it was as follows:—

And the jurors aforesaid, on their oath aforesaid, do further present, that, heretofore, to wit, on the 4th day of August, in the tenth year of the reign aforesaid, at Warwick aforesaid, in the county aforesaid, the said first-mentioned Robert Bradbury was duly brought before Henry R. Reynolds, Esq., one of the commissioners of the Court for relief of insolvent debtors in England, and duly appointed and empowered then and there to examine the said Robert Bradbury touching the matters of a certain schedule by him the said Robert Bradbury theretofore delivered into the Court aforesaid, to wit, at Warwick aforesaid, in

the county aforesaid, and purporting to contain such things as were and are required to be contained in such a schedule, according to the statute in such case made and provided. And the jurors aforesaid, on their oath aforesaid, do further present that the said Robert Bradbury did then and there state and declare, and it then and there was and still is stated and declared by the said Robert Bradbury, in and by the said schedule, and it then and there was and is still contained in and by the said schedule, to the tenor and effect following; that is to say [*it here set out the matter verbatim*], as by the said schedule will fully appear; and the said Robert Bradbury then and there subscribed the said schedule, and did there afterwards, to wit, on the 30th day of June, in the year aforesaid, at Warwick aforesaid, in the county aforesaid, file the same in the said Court. And the jurors aforesaid, on their oath aforesaid, do further present that the said Robert Bradbury, so being before the said Henry Revell Reynolds, Esq., so being such commissioner as aforesaid, in the said Court was duly sworn, and did take his corporal oath upon the holy gospel of God, concerning the truth of the contents of the said schedule (the said Henry Revell Reynolds, Esq., then and there having a lawful and competent power and authority to administer the said oath to the said Robert Bradbury in that behalf); and that the said Robert Bradbury, being so

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Busby, for the defendant.—This is charged as perjury committed in an affidavit in writing.

LORD TENTERDEN, C. J.—This is an affidavit at the end of the schedule. I am quite clear that it is an affidavit in writing.

All the proceedings in the Insolvent Debtors' Court, which were stated in the indictment, were put in and read. In the schedule, the debts mentioned in the indictment were not specified; and in an account-book of the insolvent they were marked "paid;" however, one of the persons, a Mrs. Vickers, from whom the indictment charged that a debt was due to the insolvent, stated that she had not paid the debt so due from her till after the discharge of the defendant, and that she had paid it to a person named Davis, who had been the defendant's assistant.

sworn, did then and there, to wit, on the day and year last mentioned, to wit, at the said Court-house at Warwick aforesaid, in the county aforesaid, upon his oath aforesaid, before the said Henry Revell Reynolds, Esq., so having such power and authority, falsely, corruptly, knowingly, wilfully, and maliciously depose and swear that the contents of the said schedule, and all and every part thereof, were true Whereas, in truth and in fact [*here were set out the different assignments of perjury*]. And the jurors aforesaid, on their oath aforesaid, do further present that the said matters so declared and stated by the said Robert Bradbury, and contained in his said schedule, were material in the matters of the said petition and of the said schedule, and it, during the time aforesaid, became and was material to ascertain the

truth thereof, to wit, in the county aforesaid. And the jurors aforesaid, on their oath aforesaid, do say, that the said Robert Bradbury, on the 4th day of August, in the year aforesaid, before the said Henry Revell Reynolds, Esq., so being such commissioner as aforesaid, in the said county, to wit, in the county aforesaid, the said Henry Revell Reynolds, Esq., having such power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, did commit wilful and corrupt perjury, in contempt of our lord the King and his laws, to the evil example of all others, against the form of the statute in such case made and provided, and against the peace of our said lord the King, his crown and dignity.

Adolphus, for the prosecution, wished to call another person to prove that a debt not stated in the schedule was due from him to the insolvent at the time of his petition; but this debt was not specified in the indictment, nor was the name of the alleged debtor mentioned in it at all.

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LORD TENTERDEN, C. J.—I think you are confined to the persons mentioned in the indictment. The defendant is to have notice of what he is charged with omitting.

The witness was not examined.

Busby, for the defendant.—By the 70th section of the insolvent debtors' act (*a*), the wilfully omitting property from a schedule is made an offence *per se*; and that is the offence, if any, committed by this defendant. By the 71st section (*b*), any one forswearing himself is to suffer the

(*a*) By the stat. 7 Geo. 4, c. 57, s. 70, it is enacted, "That in case any prisoner shall, with intent to defraud his or her creditors or creditor, wilfully and fraudulently omit in his or her schedule, so sworn to as aforesaid, any effects or property whatsoever, or retain or except out of such schedule, as wearing apparel, bedding, working tools and implements, or other necessities, property of greater value than 20*l.*, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor, and thereupon it shall and may be lawful for the Court before whom such offender shall have been so tried and convicted, to sentence such offender to be imprisoned and kept to hard la-

bour for any period of time not exceeding three years: and that in every indictment or information against any person for such offence, it shall be sufficient to set forth the substance of the offence charged on the defendant, without setting forth the petition, or conveyance or assignment to the provisional assignee, appointment of assignee or assignees, or any conveyance or assignment whatever, or balance sheet, order for hearing, adjudication, order of discharge or remand, or any warrant, rule, order or proceeding of or in the said Court, except so much of the schedule of such prisoner as may be necessary for the purpose."

(*b*) By this section it is enacted, "That, if any prisoner who shall apply for his or her discharge under the provisions of this act,

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same penalties as in cases of perjury. Now, I should submit that the perjury clause is affirmative, and applies to that which the party states affirmatively; and that, with respect to omissions, the other section applies. The indictment, therefore, ought to have been, not an indictment for perjury, but for the offence under the 70th section of the act.

Adolphus, for the prosecution.—The offence of perjury is quite a distinct offence from that created by the 70th section of the statute; and, although the latter offence may have been committed, yet the crime of perjury has been committed also, to give it effect. If a man took up a schedule, and were told to put in things left out, and he would not do so, he would be within the 70th section; but, if he swore to that schedule, he would perfect the offence of perjury. The 70th section does not confine the operation of the perjury clause, but the offence under that section may be committed when there is no perjury.

Busby.—To come within the 70th section, the omission must be in a schedule “so sworn to as aforesaid.”

Lord TENTERDEN, C. J.—Those words are certainly in the 70th section, and I think that debts must be taken to be “effects or property.” There are many cases in which perjury would not be committed unless some act of Parlia-

or any other person taking an oath under the provisions of this act, shall wilfully forswear and perjure himself or herself in any oath to be taken under this act, and shall be lawfully convicted thereof, he or she so offending shall suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury; and that in all cases wherein by this act an oath is required,

the solemn affirmation of any person, being a quaker, shall and may be accepted and taken in lieu thereof; and that every person making such affirmation, who shall be convicted of wilful false affirmation, shall incur and suffer such and the same penalties as are inflicted and imposed upon persons convicted of wilful and corrupt perjury.”

ment declared that the false swearing should be perjury. This act of Parliament appears to contemplate two cases—those of omission and those of commission; and I must consider that the 71st section applies to those cases which are not included in the 70th. I think that the defendant must be acquitted.

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Verdict—Not guilty.

Adolphus and Follett, for the prosecution.

Busby, for the defendant.

[Attornies—*Knight*, and *Drawbridge*].

GASKELL, Administrator of ISABELLA JACKSON, v. MARSHALL, Knt., and Another.

Nov. 30th.

TRESPASS against the Sheriff of Middlesex, for taking furniture which had belonged to the intestate at the time of her decease, and detaining it till a sum of money was paid. Plea—Not guilty.

It appeared that the intestate died on the 13th of August, 1830; and that, on the 20th of August, the plaintiff, being her nephew, took out letters of administration, and went with his wife to live in the intestate's house, in which this furniture was. It was distinctly proved that the furniture belonged to the intestate at the time of her decease, and that it was taken by the defendants in the month of November, 1830.

Gurney, for the defendants, opened, that the furniture was taken under a writ of *fieri facias*, which had issued against the plaintiff for a debt of his own; and he contend-

An intestate died in the month of August: her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November, when the goods of the intestate in the house were seized under a *fieri facias* against the administrator for a debt of his own:—*Held*, that an action lay against the sheriff by the administrator, in his representative capacity, for this seizure. But, *semble*, that, if the administra-

tor had remained in possession for a very long time, it would have been otherwise.

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ed that, if an administrator, instead of disposing of the goods of his intestate, used them as his own, and held himself out to the world as their owner, they might be taken under an execution issued against him; and he relied on the case of *Quick v. Staines*, Knt. (a), where it was held, that, if the executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.

Lord TENTERDEN, C. J.—I own that it strikes me that the marriage makes all the difference between the two cases. I think that the time that the plaintiff had been in possession is not sufficient to shew that he had made these goods his own. If the plaintiff had been in possession of the goods for a very long time, it might have been otherwise.

Verdict for the plaintiff (b).

Sir J. Scarlett and Platt, for the plaintiff.

Gurney, for the defendants.

[Attornies—Hewitt, and Smith & B.]

(a) 1 B. & P. 293.

(b) In the case of *Howard v. Jemmet*, 3 Burr. 1369, Lord Mansfield said, "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator, not even in money which specifically can be distinguished and ascertained to belong to such testator; and not to the bankrupt himself." In the case of *Farr and others v. Newman*, 4 T. R. 621, it was held that the goods of a testator, in the hands of his executor,

cannot be seized in execution in a suit against the executor in his own right. But, in the case of *Whale v. Booth*, Id. 625, n., Lord Mansfield said, "The general rule, both of law and equity, is clear that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they cannot be followed by the testator's creditors. It is also clear, that, if at the time of alienation the purchaser knows they are assets, this is no evidence of fraud."

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PARSONS *qui tam* v. CHAPMAN.

Dec. 6th.

DEBT for penalties under the stat. 10 Geo. 2, c. 28, s. 2. The *first six* counts of the declaration charged, that the defendant, without authority by virtue of letters patent, and without licence from the Lord Chamberlain, did act a certain part in a certain entertainment of the stage. The counts, from the *seventh* to the *twenty-first*, charged, that the defendant did cause to be acted a certain entertainment of the stage; and the counts, from the *twenty-second* to the *thirty-sixth*, charged, that he did cause to be acted a certain part in a certain entertainment of the stage (a). Plea—*Nil debet*.

The 2nd section of the stat. 10 Geo. 2, c. 28, inflicting a penalty of 50*l.* on persons performing, or causing to be performed, plays, &c., without letters patent, &c., is not repealed by the stat. 5 Geo. 4, c. 83.

Proof that a party was the acting manager of a theatre, and that he paid the

salary of and dismissed one of the performers, is sufficient proof that he caused the performances; and if he caused the performances, it is not material whether he did so as the agent of others or not.

(a) The *first* count of the declaration stated—"That the said defendant heretofore, and within the space of six calendar months next before the commencement of this suit, to wit, on the 10th March, 11 Geo. 4, in the parish of Saint Pancras, in the county aforesaid, and within twenty miles of London and Westminster, without authority by virtue of letters patent from his said late Majesty, or from any or either of his said late Majesty's predecessors, and without licence from the Lord Chamberlain of his said late Majesty's household for the time being, or from any other Lord Chamberlain of the King's household for the time being, and without having obtained any such licence or authority so to do, as was and is required by the statute in that case made and provided, and

without any lawful authority whatsoever so to do, [unlawfully did act, represent, and perform, for hire, gain, and reward, a certain part in a certain entertainment of the stage, to wit, in a certain entertainment of the stage, called the Gipsy's Prophecy, contrary to the form of the statute in such case made and provided, whereby] and by force of the statute in such case made and provided, the said defendant forfeited for his said offence the sum of 50*l.*; and thereby and by force of the said statute, an action hath accrued to the said plaintiff, (who sues as aforesaid), to demand and have of and from the said defendant, as well for himself the said plaintiff as for the said poor of the said parish, the said sum of 50*l.*, so forfeited as aforesaid, parcel of the said sum above demanded."

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It was proved by a witness for the plaintiff, that he went to the Tottenham Street Theatre, on eleven of the nights mentioned in the declaration, and paid at the door for his admission; and that, on seven of these occasions, the defendant acted a part in the performances. He stated the performances to have been the opera of Guy Mannering, under the name of the Gypsy's Prophecy; Morton's comedy, a Cure for the Heart Ache, under the name of Father and Son; and other pieces. The former he stated to consist of dialogue, without singing, and occasionally songs, the dialogue taking up more time than the songs. It was also proved by Mr. Gattie, that he had been an actor at this theatre at the times in question, and that the defendant was the acting manager, and generally paid him his salary; and that he also dismissed him from the theatre.

J. Williams, for the defendant. It ought to be proved that the defendant has no letters patent.

LORD TENTERDEN, C. J.—I will take a note of the objection (*b*).

The next five counts merely varied in the names of the pieces performed.

The *seventh* count was exactly similar, substituting the following for the words within brackets—"unlawfully did cause to be acted, represented, and performed for hire, gain, and reward, a certain entertainment of the stage, to wit, a certain other entertainment of the stage, called Who Rules, or the Sultan and the Slave; contrary to the form of the statute in such case made and provided, and whereby—"

The next fourteen counts merely varied in the names of the pieces performed.

The *twenty-second* count was similar, substituting the following words for those within brackets in the first count—"unlawfully did cause to be acted, represented, and performed, for gain and reward, a certain part in a certain entertainment of the stage, to wit, in a certain entertainment of the stage, called Who Rules, or the Sultan and the Slave; contrary to the form of the statute in such case made and provided, whereby—"

The remainder of the counts merely varied in the names of the pieces performed.

(*b*) No motion was made in the Court above on this point.

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J. Williams.—By the stat. 10 Geo. 2, c. 28, s. 1, persons, acting for hire, gain, or reward, any interlude, tragedy, &c. in any place where they have no legal settlement, are, unless authorized by letters patent, or by the licence of the Lord Chamberlain, to be deemed rogues and vagabonds; and by sect. 2, persons, whether they have a legal settlement or not, are to forfeit 50*l.*, and, in case it is paid, are not to suffer as rogues and vagabonds. By the stat. 5 Geo. 4, c. 83, all the provisions respecting rogues and vagabonds are repealed, and there is in that statute no enactment of any kind respecting players. Now, I submit, that, as the 2nd section of the stat. 10 Geo. 2, c. 28, speaks of the parties as offenders, and of the offence, this section is repealed by the stat. 5 Geo. 4, c. 83.

LORD TENTERDEN, C. J.—I am clearly of opinion, that the 2nd section of the stat. 10 Geo. 2, c. 28, is not repealed by the act you have cited.

J. Williams addressed the Jury, and contended, that there was not sufficient evidence, that the defendant either caused the performances or acted for hire, gain, or reward.

LORD TENTERDEN, C. J.—As to that part of the case, which relates to the causing of the performance, there are two questions:—*First*, Was the performance for hire, gain, or reward? and, *secondly*, Was it caused by the defendant? That these performances were exhibited for hire and reward, no one can doubt, as money was paid at the doors for admission. The defendant himself played in seven of the pieces, but there is no evidence that he was paid for so doing; indeed, if he was interested in the theatre, he would hardly be paid for acting. It is proved, that the defendant was the acting manager, and paid Mr. Gattie his salary, and finally dismissed

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him; and I do not know that there can be any stronger evidence that a person causes the pieces to be performed.

In answer to a question asked of the Court by the Jury, his Lordship said—"If the defendant caused the performance, that is sufficient; and it makes no difference, that he did so as an agent for others."

Verdict for the plaintiff, for seven penalties.

Lord TENTERDEN, C. J.—Do you find for the acting, or the causing to be represented, or both.

The Foreman of the Jury—Both.

Sir *J. Scarlett*, *Campbell*, and *Adolphus*, for the plaintiff.

J. Williams, for the defendant.

[Attornies—*Lowdham & Co.*, and *Rogers & Co.*]

By the stat. 10 Geo. 2, c. 28, s. 1, it is enacted, "That every person who shall, for hire, gain, or reward, act, represent, or perform, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, in case such person shall not have any legal settlement in the place where the same shall be acted, represented, or performed, without authority by virtue of letters patent from his Majesty, his heirs, successors, or predecessors, or without licence from the

Lord Chamberlain of his Majesty's household for the time being, shall be deemed to be a rogue and a vagabond within the intent and meaning of the said recited act; [12 Ann. st. 2, c. 23, which is repealed by 13 Geo. 2, c. 24], and shall be liable and subject to all such penalties and punishments, and by such methods of conviction, as are inflicted on or appointed by the said act for the punishment of rogues and vagabonds, who shall be found wandering, begging, and misordering themselves, within the intent and meaning of the said recited act."

By sect. 2 of the same stat. it is enacted, "That if any person having or not having a legal settlement as aforesaid, shall, without such authority or licence as aforesaid, act, represent, or perform, or cause to be acted, represented or performed, for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts therein, every such person shall, for every such offence, forfeit the sum of 50*l.*; and in case the said sum of 50*l.* shall be paid, levied, or recovered, such offender shall not, for the same offence, suffer any of the pains or penalties inflicted by the said recited act."

By sect. 6 of the same stat. it is enacted, "That all the pecuniary penalties inflicted by this act, for offences committed within that part of Great Britain called England, Wales, and the town of Berwick-upon-Tweed, shall be recovered by bill, plaint, or information, in any of his Majesty's Courts of record at Westminster, in which no essoin, protection, or wager of law shall be allowed; and for the offences committed in that part of Great Britain called Scotland, by action or summary complaint before the Court of Session or Justiciary there; or for offences committed in any part of Great Britain, in a summary way before two justices of the peace for any county, stewartry, riding, division, or liberty, where any such offence shall be committed, by the oath or oaths of one or more credible witness or witnesses, or by the confession of the

offender; the same to be levied by distress and sale of the offender's goods and chattels, rendering the overplus to such offender, if any there be, above the penalty and charge of distress; and for want of sufficient distress, the offender shall be committed to any house of correction in any such county, stewartry, riding, or liberty, for any time not exceeding six months, there to be kept to hard labour; or to the common gaol of any such county, stewartry, riding, or liberty, for any time not exceeding six months, there to remain without bail or mainprize; and if any person or persons shall think him, her, or themselves aggrieved by the order or orders of such justices of the peace, it shall and may be lawful for such person or persons to appeal therefrom to the next general quarter sessions to be held for the said county, stewartry, riding, or liberty, whose order therein shall be final and conclusive; and the said penalties for any offence against this act shall belong, one moiety thereof to the informer or person suing or prosecuting for the same, the other moiety to the poor of the parish where such offence shall be committed."

By sect. 8 of the same stat.—
"No person shall be liable to be prosecuted for any offence against this act, unless such prosecution shall be commenced within the space of six calendar months after the offence committed."

By the stat. 5 Geo. 4, c. 83, it is enacted, "That all provisions heretofore made relative to idle

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and disorderly persons, rogues and vagabonds, incorrigible rogues, or other vagrants in England, shall be, and the same are hereby repealed, except only as to any offence committed before the pass-

ing of this act, which shall be punished under the provisions of the said recited act, [3 Geo. 4, c. 40], and save and except as hereinafter excepted."

Dec. 10th.

SCARTH, Gent., One &c., v. GARDENER, Esq.

To bring a party within the stat. 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand of it should be made on the land on which he was sporting; but the demand must be made so immediately after the party has left the land, as to form a part of the same transaction.

It is not necessary that the person making the demand should produce any certificate; and if the other party refuses to produce his, he takes the risk of whether the person demanding is one having a right to make such demand.

If a person refuses to produce his game certificate, or to

tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty.

If a plea justifying a libel state that an information was laid before a magistrate, an examined copy of the magistrate's conviction, reciting the information, is sufficient proof of the information.

LIBEL. The declaration stated that the defendant had published a libel of and concerning the plaintiff. The libel was headed—"Conviction of an attorney for poaching," and professed to give an account of an appeal of the plaintiff against a conviction of the defendant, "for not producing a game certificate on demand, and refusing to give his name," &c. There was no plea of the general issue, but there were five pleas of justification; and in the *first* of them, (which was the only one relied on), it was stated (*inter alia*) that the plaintiff had shot over certain preserves within the manor of Harleyford, and on those occasions did elude the vigilance and pursuit of the gamekeepers by refusing to produce a game certificate, or declare his name and place of residence, as is by law required; and that one William Goodey came before the defendant, being a justice and commissioner of taxes, and upon the oath of Edward Merry, a credible witness, exhibited his information. It then stated the information, which alleged that Merry was the gamekeeper of the Hon. Henry Walker, that the plaintiff was killing game, and that Merry had required the plaintiff to produce his game certificate, and that he refused to produce it, and also to tell

his Christian and surname, and place of residence, and the parish or place, if any, in which he was assessed. This plea went on to state the conviction of the plaintiff before the defendant on the statute 52 Geo. 3, c. 93, and the plaintiff's appeal and the affirmance of the conviction. Replication—*de injuria*.

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Platt, for the plaintiff, having opened the pleadings, Sir *J. Scarlett*, for the defendant, stated his case.

It appeared that the plaintiff was out shooting in the neighbourhood of Henley upon Thames; and that Edward Merry, the gamekeeper of the Hon. Henry Walker, seeing him shooting in a field within his manor, asked him to produce his game certificate, which he would not do; and that he also asked the plaintiff his Christian and surname, and residence, and also where he was assessed (if any where) to the game duty, which the plaintiff would not tell him. It also appeared that another gamekeeper, named House, seeing the plaintiff sporting in a field, went after him; but, before he overtook the plaintiff, the latter had got into a public road; and there House asked him to produce his certificate; and on his refusing to do so, he asked him his name and residence; but these the plaintiff also refused to tell; and House did not go on to ask him in what parish or place he was assessed to the game duty.

An examined copy of the conviction of the plaintiff before the defendant was put in. It had been procured from the office of the clerk of the peace. It recited the information of William Goodey, exhibited on the oath of Edward Merry, as stated in the plea.

Campbell, for the plaintiff, objected that the information must be put in.

LORD TENTERDEN, C. J.—The conviction which is put in is sufficient evidence of it.

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Campbell, in reply.—With respect to the demand of the certificate by House, that amounts to nothing. By the act of Parliament it is required that the party should be first asked for his certificate; and, if that is not produced, he must be asked his Christian and surname, and residence, and in what parish or place (if any) he is assessed.

Lord TENTERDEN, C. J.—If he refused to tell his name and residence it was quite useless to go on to ask any other question.

Campbell.—The second gamekeeper, House, when he asked for the certificate, did not do so on the land, the plaintiff being then on the turnpike road.

Lord TENTERDEN, C. J., (in summing up).—I am not prepared to say that the demand of the certificate must be made on the land. It might happen, that, seeing the gamekeeper, a person might get into the road before the keeper could come up to him, and thus the statute might be evaded. However, I think that the demand, if not actually made on the land, must be made immediately, and so as in some degree to form a part of the same transaction. It is not necessary that a gamekeeper making the demand should produce any certificate; and, if the other party refuse to produce his certificate, he does so at the risk of whether the party demanding it is a gamekeeper, or other person having a right to demand it.

His Lordship asked the Jury, in case they found for the defendant, to inform him what damages they would give if the facts stated in the plea did not amount to a justification of the whole of the statements of the libel.

The Jury found a verdict for the defendant on the first plea; and said they should give 1s. damages, in case the plea should not be sufficient.

Campbell, Comyn, and Platt, for the plaintiff.*Sir J. Scarlett and Talfourd*, for the defendant.[Attornies—*Scarth*, and *Routledge*.]

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By the statute 52 Geo. 3, c. 93, schedule L, "Every person who shall use any dog, gun, net, or other engine, for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail or landrail, or any conies, or shall take or kill, by any means whatever, or shall assist in any manner in the taking or killing, by any means whatever, any game, or any woodcock, snipe, quail, or landrail, or any coney, by virtue of any deputation or appointment, duly registered or entered as gamekeeper for any manor or royalty in England, Wales, or Berwick upon Tweed, or for any lands in Scotland," is made chargeable with the game duty, and must take out a game certificate in the manner therein prescribed. And by s. 11 of this schedule, "if any person shall be discovered doing any act whatever, in respect whereof such person shall be chargeable as aforesaid, by any assessor or collector of the parish where any such person shall then be, or by any commissioner for the execution of this act, acting for the county, riding, division, or place in which such person shall then be, or by any lord or lady, or gamekeeper of the manor, royalty, or lands, wherein such person shall then be, or by any inspector or surveyor of taxes, acting in the execution of the said acts or this act, for the district in which such person shall then be,

or by any person duly assessed to the duties granted in this schedule, or consolidated therewith, or by the owner, landlord, lessee, or occupier of the land in which such person shall then be, it shall be lawful for such assessor, collector, commissioner, or gamekeeper, inspector or surveyor, or other person as aforesaid, or such owner, landlord, lessee, or occupier of land as aforesaid, to demand and require from the person so acting the production of a certificate issued to him for that purpose, which certificate every such person is hereby required to produce to the person so demanding the same, and to permit him to read the same, and (if he shall think fit) to take a copy thereof, or any part thereof; or in case no such certificate shall be produced to the person demanding the same as aforesaid, then it shall be lawful for the person having made such demand to require the person so acting forthwith to declare to him his Christian and surname, and place of residence, and the parish or place (if any) in which he shall have been assessed to the duties by this act granted or consolidated therewith; and if any such person shall, after such demand made, wilfully refuse to produce and shew a certificate issued to him for that purpose, or, in default thereof as aforesaid, to give in to the person so demanding the same his Christian and surname, and place of re-

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sidence, and the parish or place (if any) in which he shall have been assessed; or shall produce any false or fictitious certificate, or give any false or fictitious name, place of residence, or place of assessment, every such person shall forfeit and pay the sum of twenty pounds, to be sued for, recovered, and applied in the manner hereinafter directed."

By the stat. 7 & 8 Geo. 4, c. 30, s. 28, any person *found committing* any offence against that act may be *immediately apprehended*, without warrant; and it was held, in the case of *Hanway v. Boulton*, ante, Vol. 4, p. 350, that, to justify an apprehension under that section, the party apprehended must be either taken in the fact or else in quick pursuit.

BEFORE MR. JUSTICE J. PARKE.

(*Who sat for the Lord Chief Justice*).

Dec. 12th.

HYDE v. MOAKES.

A., the landlord of premises, sued B. as assignee of a lease, for rent due, with a count for use and occupation. At the trial, A. put in the lease, which was a lease to W., who had taken the benefit of the Insolvent Debtors' act. It was proved, that B. had occupied the premises, and had treated A. as landlord, and had paid rent to him; but that the lease had never been assigned:—
Held, that A. could not recover against B., either for the rent or for the use and occupation.

DEBT for rent against the defendant, as the assignee of a lease, with a count for use and occupation. The defendant pleaded to the *first* count, that no interest passed to him as assignee; and to the *second* count, *nil debet*.

On the part of the plaintiff, a lease, dated in the year 1819, (which was still subsisting), and which was granted to a person named Worcester, was put in; and it appeared that Worcester had been discharged under the Insolvent Debtors' Act, and that, in the year 1824, the defendant was in possession of the premises, but how he came into possession was not shewn. The defendant was, at that time, in partnership with a person named Elisha, who was his father-in-law, and they continued to occupy the premises, and pay the rent, down to the year 1828. In that year, Elisha and the defendant dissolved their partnership, and the defendant wrote to the plaintiff, appriz-

ing him of the dissolution; at the same time saying, that he would continue to occupy the premises. Letters were produced, in which the defendant recognised the plaintiff as landlord, promising payment of the rent; but Elisha, being called as a witness, proved that there had never been any assignment of the lease: and it was then conceded by the plaintiff's counsel, that the plaintiff could not recover on the *first* count.

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Mr. Justice J. PARKE held, that the plaintiff could not recover on the count for use and occupation, as there was no express substitution of the defendant for the original lessee as tenant.

His Lordship directed a

Verdict for the defendant (*a*).

Barstow, for the plaintiff.

Sir *J. Scarlett* and *Comyn*, for the defendant.

[Attornies—*Hyde*, and *Elkins & Co.*]

IN the ensuing Term, *Barstow* moved for a rule to shew cause why there should not be a new trial, on the ground that the plaintiff was entitled to recover on the count for use and occupation. But the Court refused a rule (*b*).

(*a*) For the report of this case we are indebted to the kindness of one of the learned counsel engaged in it.

(*b*) In the case of *Phipps v. Sculthorpe*, 1 B. & A. 50, where premises had been let to N. F. H. for a term, determinable on a notice to quit, and, pending the term, the defendant applied to the plaintiff, who was the landlord, for leave to become tenant instead of

N. F. H., and, on the plaintiff consenting, the defendant offered "to stand in the shoes of N. F. H.," and offered to pay the plaintiff the whole rent due for the then current quarter: it was held, that although the term of N. F. H. had not been determined, the plaintiff might maintain an action for use and occupation, against the defendant, and that the latter could not set up the title of N. F. H.

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BEFORE LORD TENTERDEN, C. J.

Dec. 13th.

BRIANT *v.* EICKE, Gent., One &c.

A. having a cause of action against B., is discharged under the Lords' act, but does not execute any assignment, alleging that he has no property. After his discharge, he gives B. a release: this release is good; and therefore, if in an action by A. against C., it appear that A. might sue B. if he did not recover against C., A. may, notwithstanding this discharge, release B. and make him a competent witness.

ASSUMPSIT. The declaration stated, in substance, that, in consideration that the plaintiff would enter into a bond to the sheriff of Surrey, the defendant undertook to indemnify him. Plea—General issue.

It was opened on the part of the plaintiff, that the sheriff of Surrey would not seize certain goods under an execution, in a cause of *Noakes v. Humphreys*, without an indemnity; and that the plaintiff, being a client of the defendant's, was desired by him to join Mr. Noakes, the then plaintiff, in the bond to the sheriff, and that he (the defendant) said he would save the plaintiff harmless. It was further stated by the plaintiff's counsel, that the plaintiff did execute the bond, and was afterwards obliged to pay a sum of money.

To prove the agreement of the defendant to save the plaintiff harmless, Mr. Noakes was called.

The defendant objected that he was not a competent witness, as he would be liable in an action by the plaintiff if the latter did not succeed in the present action.

To obviate this objection, the plaintiff released Mr. Noakes.

The defendant.—This release, I submit, is not good, as the plaintiff, since the cause of action against Mr. Noakes accrued to him, has been discharged under the Lords' act. To prove which, I have here examined copies of all the proceedings.

Lord TENTERDEN, C. J.—Has any assignee been appointed under the Lords' act?

The defendant.—No, my Lord. When Mr. Noakes came up under the Lords' act, he swore he had nothing to assign, and therefore no assignment was executed.

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LORD TENTERDEN, C. J.—The words of the Lords' act (a) are, that "no release of any such prisoner or prisoners, his or her executors or administrators, or any trustee for him, her, or them, *subsequent to such assignment* and conveyance, shall be pleadable or be allowed of in bar of any action or suit, which shall be commenced by any, such assignee or assignees of any such prisoner or prisoners, for the recovery of any of his, her, or their estate or effects." Was this release executed after the plaintiff's discharge under the Lords' act?

Sir J. Scarlett.—Yes, my Lord.

The defendant.—I submit that this cannot be a good release; the Lords' act requires the party to assign all his property; and if this party had a cause of action against Mr. Noakes, would not the Court call upon him to amend his schedule, and assign it; and, if his assignee sued Mr. Noakes, would a release by the plaintiff be any defence? Can this, therefore, be a good release?

LORD TENTERDEN.—This release does not come within the provisions of this act of Parliament; and I must, therefore, receive the witness.

Mr. Noakes was examined.

Verdict for the plaintiff.

Sir J. Scarlett and R. V. Richards, for the plaintiff.

The defendant in person.

[Attornies—*Vansandau*, and *Eicke*.]

(a) 32 Geo. 2, c. 28, s. 13.

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IN the ensuing Term, *Curwood* moved for a rule to shew cause, why there should not be a new trial. But the Court refused the rule.

Dec. 16th.

DICKENSON, Gent., v. HATFIELD.

If, since the stat. 9 Geo. 4, c. 14, a defendant by a letter admit a balance to be due, without stating the amount, this will take the case out of the statute of limitations, so as to entitle the plaintiff to nominal damages.

The object of the stat. 9 Geo. 4, c. 14, was to procure that in writing for which words were previously sufficient.

ASSUMPSIT for 5*l.* 8*s.* 6*d.* for a balance due on a promissory note. Pleas—General issue, and the statute of limitations.

It appeared that the defendant gave the plaintiff a promissory note for 23*l.* in the year 1820, to be paid by instalments; and that, in April, 1824, there were 4*l.* due upon it; when the plaintiff wrote to the defendant on the subject, and received an answer from the defendant expressing regret that the balance was not paid, and saying that his brother should shortly call and pay it. At the bottom of this letter was a postscript, directing that the postage of the letter should be put to the defendant's account. The present action was commenced in January, 1830; so that six years did not intervene between the date of this letter and the commencement of the action.

Comyn, for the defendant.—I submit that the defendant is barred by the statute 9 Geo. 4, c. 14; for, though the defendant by his letter admits that something is due, he does not specify any particular sum. And it was decided in the Court of Common Pleas, in the last Term, that a written acknowledgment of a debt, without stating the amount, was not sufficient to take the case out of the statute, as Lord *Tenterden's* act requires that an acknowledgment of the whole debt should be stated in writing (a).

(a) *Kennett v. Millbank*, 8 Bing. 38. This was an action on a promissory note, in which the statute

of limitations was pleaded. To take the case out of the statute a composition deed was put in. This

Barstow, for the plaintiff, submitted, that even if the Court was with the defendant on this objection, he was still entitled to a verdict for the postage of the letter. Upon the question as to the construction of the act of Parliament he was stopped by the Court.

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LORD TENTERDEN, C. J.—I am of opinion that this debt is not barred by the statute. The object of the statute was to procure that in writing for which words were previously sufficient. Here there is an acknowledgment of a balance due, but what that balance was we are at a loss to know. The plaintiff is entitled to a verdict for a shilling damages.

Verdict for the plaintiff, damages 1s.

Barstow, for the plaintiff.

Comyn, for the defendant.

[Attornies—*Dickenson & K.*, and *Egan & W.*]

LEAVE was reserved to the defendant to move to enter a nonsuit; but he acquiesced in the verdict, and no motion was made.

deed was executed by the defendant, and recited that he was indebted to the plaintiff and others; but the amount of the debts was not specified. The plaintiff never executed the deed, and there was a proviso that if all creditors, whose debts amounted to 10*l.*, did not execute the deed by a certain day, the deed should be void. It

was admitted at the trial that the note sued on was the only debt due from the defendant to the plaintiff. Held, that this did not take the case out of the statute of limitations. See the cases of *Dixon v. Deveridge*, ante, Vol. 2, p. 109, and *Braithwaite v. Churchill*, Id p. 341.

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Dec. 17th.

BRADSHAW v. BENNETT.

In *assumpsit* by vendee against vendor to recover back a deposit paid on the purchase of real property, the defendant at the trial produced (under a notice to produce) the agreement which had been signed at the foot of the conditions of sale:—*Held*, that it was not necessary to call the subscribing witness to prove the execution of this agreement.

Where, in the particulars of sale, property was stated to be held under the C. estate upon three lives, and it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the C. estate:—*Held*, that the defendant could not call the auctioneer to prove that he stated before the sale that the life had dropped; but that the defendant might give evidence to shew that, before the sale, the plaintiff had read the original lease under which the property was held.

A party recovering back a deposit paid on the purchase of real property is not entitled to interest.

ASSUMPSIT for money had and received. Plea—General issue. This action was brought by the vendee against the vendor to recover back a deposit paid on the purchase of certain property, alleged to be held under the Clayton estate.

The plaintiff had purchased the property at auction, and had signed the usual agreement at the foot of the conditions of sale.

This agreement was produced by the defendant under a notice to produce.

Campbell, for the defendant, objected that the subscribing witness must be called.

Kelly, for the plaintiff, cited the case of *Doe dem. Tynedale v. Hemming* (a).

Campbell.—The instrument is admissible without calling the subscribing witness only where the party has a benefit under it; for instance, if there was a lease, and the party enjoyed the land under it; but this is a case where a subscribing witness is most wanted. It is an action on the instrument, which the defendant says he is not to be bound by. The subscribing witness is necessary to prove what occurred when this agreement was entered into.

Lord TENTERDEN, C. J.—What are the cases in which it would not be necessary to call the subscribing witness?

(a) 9 D. & R. 15. And see also the cases of *Pearce v. Hooper*, 3 Taunt. 60; *Orr v. Morris*, 6 Moore, 347; and *Burnett v. Lynch*,

8 D. & R. 368. All the cases on this subject are abstracted in 1 Phill. on Ev. 448.

Campbell.—Where the agreement has been acted upon.

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J. Williams, for the plaintiff.—Here the deposit money has been paid under it.

Campbell.—This is an action founded upon the contract, which was not so either in the case of *Rex v. Middlezoy* (a), or in the case of *Gordon v. Secretan* (b).

J. Williams.—Here both parties are claiming under this agreement. I am seeking to get back the money, and the defendant is seeking to retain it, by virtue of this instrument.

Lord TENTERDEN, C. J.—This is an agreement which the defendant produces, and under which he claims an interest; I think that the principle therefore applies. The agreement may be read.

The agreement was put in; it had been signed by the plaintiff, but not by the defendant.

Lord TENTERDEN, C. J.—This is a very strong case of not calling the subscribing witness. He was only to prove the plaintiff's signature, and not the defendant's.

The particulars of sale were read. They stated the property to be held on three lives; but it was admitted that at the time of the sale only two lives were in existence, the third having died after the printing of the conditions of sale, and before the day of the auction. An objection was also made, that the property was not held directly under the Clayton estate.

The conditions of sale were read, and contained the usual condition, that any misdescription or misstatement should not vitiate the sale, but a compensation be allowed.

(a) 2 T. R. 41.

(b) 8 East, 548.

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To obviate the first of these objections, *Campbell*, for the defendant, proposed to call the auctioneer, to prove that he stated before the sale that one of the persons, on whose life the property was held, was dead; and, as to the other point, he proposed to prove, that before the sale the plaintiff, who was stated to be a conveyancer, had read over the lease under which the property was held.

J. Williams objected that the evidence of the auctioneer was not receivable; and cited the case of *Powell v. Edmunds* (a).

LORD TENTERDEN, C. J.—On the authority of that case I cannot receive the evidence; I think that a very wholesome case. You propose to prove that the plaintiff read the original lease; that you may do, as it does not contradict the particulars of sale. Before the sale the auctioneer ought to have altered the particulars with respect to the lives, so as to have made them conformable to the fact.

Campbell.—That could have been easily done.

Some other objections were raised, when—

LORD TENTERDEN, C. J., suggested that a special case should be stated; and that one of the questions to be raised by it should be, whether the evidence of the auctioneer ought to have been received, to prove that he stated the decease of one of the parties, on whose life the property was held.

Campbell.—Would your Lordship allow us to add a

(a) 12 East, 6. In that case the printed conditions of sale, which was of timber, did not state any particular quantity; and it was held, that parol evidence was not

admissible to prove that the auctioneer warranted it to be a particular quantity, because it varied the written contract.

question, whether the other side ought to have called the subscribing witness.

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Lord TENTERDEN, C. J.—I think not; I do not like to reserve points where I have no doubt.

Verdict for the plaintiff, subject to a case.

J. Williams, for the plaintiff, asked that interest should be added to the amount of the verdict.

Lord TENTERDEN, C. J.—I think not; I do not know of any case of this kind in which interest has been allowed (*a*).

J. Williams and *Kelly*, for the plaintiff.

Campbell and *Hutchinson*, for the defendant.

[Attornies—*Horsley* and *Kempster*.]

(*a*) For the authorities in equity Purch. pp. 208, 426.
on this point see Sugd. Vend. and

First Sitting at Westminster, in Hilary Term,
1832.

BEFORE MR. JUSTICE J. PARKE.

TROTTER *v.* SIMPSON and Another.

TRESPASS for injuring the plaintiff's house. Pleas
—General issue, and leave and licence. Replication, de-
nying the licence.

Jan. 13th.

The building
act, 14 Geo. 3,
c. 78, s. 100,
limits actions to
be brought
within three

months. A. had begun to build a party wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—*Held*, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must bring ejectment.

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It appeared, that the alleged trespass was committed in the building of a party wall, a part of which was stated to extend too far over the plaintiff's premises.

For the defence, the 100th section of the building act, 14 Geo. 3, c. 78, was relied on. It was alleged, that this party wall was built in August, 1830; that the plaintiff had given a notice of action, under that section of the building act, on the 14th of December, 1830, and that the writ was sued out on the 19th of January, 1831.

For the plaintiff it was stated, that the wall had not been completely finished, till within three months of the commencement of the action.

Mr. Justice J. PARKE.—If any part of the trespass was within the three months, the plaintiff may recover for that part, which will carry the costs; and, if he is too late with his action altogether, he must bring an ejectment.

Campbell, for the plaintiff.—The soil is ours, and every fresh course of bricks laid on is a fresh trespass.

Mr. Justice J. PARKE.—If any thing was done to the wall within three months of the commencement of the action, the plaintiff may recover something, and get his costs.

The cause was referred, to ascertain whether any part of the trespass had been committed within three months of the commencement of the action, and to direct a compensation to be paid, and a conveyance to be executed, so as to avoid the bringing of an ejectment.

Campbell and Talfourd, for the plaintiff.

Comyn, for the defendant.

[Attornies—*Walter*, and *Coles*.]

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By the stat. 14 Geo. 3, c. 78, s. 100, it is enacted "That no action or suit shall be commenced against any person or persons, for any thing done in pursuance of this act, until twenty-one days after notice in writing of an intention to bring such action or suit has been given to the person or persons against whom such action or suit shall be brought, nor after the expiration of three calendar months next after the fact committed; and every such action or suit, the cause whereof shall arise within the said city of London, or the liberties thereof, shall be laid and tried in the said city of London, and not elsewhere; and every such action or suit, the cause whereof shall arise in any part of the limits aforesaid, out of the said city of London and liberties thereof, shall be laid and tried in the county of Middlesex, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence, at any trial or trials to be had thereupon, and that the matter or thing for which such action or suit is brought was done in pursuance and by the authority of this act: And if the said matter or thing appear to have been so done, or if it appear that such action or suit was brought before the expiration of twenty-one days after such notice

given as aforesaid, or that sufficient satisfaction was made or tendered before such action was brought; or if any such action or suit be not commenced within the time herein for that purpose limited, or be laid in any other county or place than as aforesaid; then the Jury, in every such action or suit, shall find for the defendant or defendants therein; and if a verdict be found for the defendant or defendants, or if the plaintiff or plaintiffs in any such action or suit become nonsuited, or discontinue, or suffer a discontinuance of any such action or suit; or if, in any such action or suit, judgment be given for the defendant or defendants therein on demurrer, or by default, or otherwise; then, and in any of the cases aforesaid, the defendant or defendants shall have judgment to recover treble costs of suit, and shall have such remedy for recovering the same, as any defendant or defendants may have for costs in other cases by law."

In the case of *Pratt v. Hillman*, 6 D. & R. 360, it was held, that if a person *bonâ fide* intending to pursue the authority given by the building act, erects a party wall, without in fact pursuing its directions, and thereby injures his neighbour, he is liable to an action; but it must be brought after twenty-one days' notice, and within three months.

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*Second Sitting at Westminster, in Hilary Term,
1832.*

BEFORE MR. JUSTICE J. PARKE.

Jan. 17th.

HEMING and Another, Gent., two &c. v. WILTON,
Gent., one &c.

A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered:—*Held*, that A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second.

ASSUMPSIT for an attorney's bill. Plea—General issue.

It was opened by *Kelly* for the plaintiff, that this action was brought to recover the same demand for business done, which was the subject of the case reported *ante*, Vol. 4, p. 318, in which the plaintiffs only recovered a sum of 4*l.* for money lent, but could not recover for the business done, as no bill had been delivered under the stat. 3 Jac. 1, c. 7, s. 1.

Butt, for the defendant.—I submit that the plaintiffs cannot recover. There was a previous action, in which this claim was made a part of the demand, and in which the plaintiffs obtained a verdict for 4*l.*; they, therefore, cannot succeed in another action for the same thing.

Mr. Justice J. PARKE.—This was a part of the plaintiffs' demand, which was not due at the time of the former action, because a certain step (the delivering a bill) had not been taken.

Butt.—Does not your Lordship think, that they should have elected to have been nonsuited in the former action.

Mr. Justice J. PARKE.—No; as this was a demand not then due.

Verdict for the plaintiffs.

Kelly, for the plaintiff.

Butt, for the defendant.

[Attornies—*Heming & B.*, and *Wilton*.]

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COURT OF COMMON PLEAS.

Sitting at Westminster after Trinity Term, 1831.

BEFORE LORD CHIEF JUSTICE TINDAL.

LONG v. CHUBB.

June 14th.

LIBEL.—The declaration stated, that before, and at the time, &c., the plaintiff was a good, true, just, and faithful subject, &c., and that before, and at the time, &c., he had been and was a *medical practitioner, and as such had practised, and was continuing to practise with great reputation and success*, whereby he had acquired, and was then daily and *honestly* acquiring, sundry great gains, &c. Yet, that the defendant, greatly envying &c., and contriving, and wickedly and maliciously *intending to injure the plaintiff in his reputation, and also in his said practice*, on &c., at &c., published of and concerning the said plaintiff, and of and concerning him in his said practice, a certain false, scandalous, malicious, and defamatory libel, &c. &c. &c.

The declaration in an action for libel alleged that the plaintiff was a good and faithful subject, &c., and that he was a *medical practitioner*, and stated the libel to have been published of and concerning him, and of and concerning him in his said practice. No evidence was given of any licence or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely

as “Physician extraordinary to several ladies of distinction,” and “doctor, or rather quack:”—*Held*, that this did not withdraw the claim to damages in the medical capacity from the consideration of the Jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character.

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The libel, (which was published while a prosecution against the plaintiff for manslaughter (a) was pending, to which it alluded), was contained in a penny pamphlet, purporting to be "The Life of John Driscoll, self-styled Mr. John St. John Long, the *Harley Street Quack, Physician Extraordinary* to several ladies of distinction, with whom his universal success obtained for him the appellation of the female destroyer." The following motto was on the title page:—

"When age and infirmities sink to the tomb,
The mind is prepared by decay or disorder;
But when beauty's cut off in life's opening bloom,
We curse the *vile quack* who committed the murder."

The first part set out in the declaration, in addition to the title and motto, purported to give a history of the plaintiff's early years; but the only portion of it which bears upon the point in the cause, was that which spoke of persons who since "had the misfortune to come *within his doctrinal prescriptions*." The only other material part was that which, after a statement that he obtained his living by painting portraits, went on to say, "and we could relate several anecdotes of a very peculiar description, in which he was engaged, one of which was no doubt the cause of his changing his profession from a painter to *a doctor, or rather quack*."

It was proposed on the part of the plaintiff to read a pamphlet which had been published since the cause had been set down, and which was purchased at the defendant's shop of a person representing herself as his wife. It contained libellous observations on the plaintiff, in reference to a postponement which had taken place of the trial.

(a) This was the second prosecution, on which he was acquitted. For an account of it, as well as of

the first, in which he was sentenced to pay a fine of 250*l.*, see Vol. 4 of these Reports.

Spankie, Serjt., objected.—It is a distinct libel, for which the defendant is responsible, and cannot be given in evidence in this case.

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TINDAL, C. J.—I think it is admissible, as something that relates to this very cause.

It was then read.

No proof was given of any licence or other authority from any public body to the plaintiff to practise in any medical capacity; nor, indeed, was it suggested that he had received any such.

Spankie, Serjt., for the defendant.—The plaintiff must be nonsuited. The declaration avers that he is a medical practitioner; which must mean that he is an authorized practitioner, recognised by the law; and this is not admitted by the libel. The libel does not anywhere speak of him as a regular medical practitioner.

TINDAL, C. J., was of opinion that the case must go to the Jury, and—

Spankie, Serjt., then addressed them for the defendant.

TINDAL, C. J., (in summing up) said—The declaration states, that the plaintiff was a medical practitioner, and goes on to state that the libel was published of and concerning him in his character of a medical practitioner, and in his private capacity. There is no proof in this case that the plaintiff has brought himself within any of the regular degrees, physician, surgeon, apothecary, or licentiate. But if you think that the libel speaks of him as a medical practitioner, though you would not give him such damages as you would give to a regular practitioner, yet the matter is not wholly withdrawn from your consideration. But the

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main part of the libel seems to be that which reflects upon him in his private character. There is no doubt as to the libel on the private character, for there are several things which are clearly libellous, and must be taken to be false, as the defendant had an opportunity of putting a justification on the record, and of proving the facts if they were true. Fair and candid criticism is not a libel, but a malevolent attack on an individual is. You are not to give damages for the publication which was purchased at the defendant's shop after this action was commenced, because it may be made the subject of complaint in another action. It is only evidence to remove any doubt which might be entertained by you, of the defendant's motives in publishing the first pamphlet.

Verdict for the plaintiff, damages 100*l*.

Wilde, Serjt., *C. Phillips*, and *Tomlinson*, for the plaintiff.

Spankie, Serjt., *Kinglake*, and *C. Jones*, for the defendant.

[Attornies—*Harmer*, and *in Person*.]

June 14*th*.

PLANCHE v. COLBURN and Another.

An author was engaged to write for a certain sum an article to appear among others in a work called "The Juvenile Library." Before he had completed his article, and before

any portion of it was published, the work in which it was to appear was discontinued:—*Held*, that the publishers were not entitled to claim the completion of the article, that it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part which he had prepared:—*Held* also, that such reasonable sum was recoverable on a *quantum meruit* in a common count for work and labour.

THE *first* count of the declaration stated, that the defendants were publishers of books, and were designing for publication a work to be entitled "The Juvenile Library," and had applied to the plaintiff to write for them a certain volume on costume, to form part of the said work, which the plaintiff had agreed to do; and thereupon, in consi-

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deration of the premises, &c., the defendants undertook to pay the plaintiff the sum of 100*l.* for the said volume, whenever, after the writing of the same by him, and the delivery thereof to them, they should be thereunto requested. It then averred, that the plaintiff commenced writing the volume, and wrote a great part of it, and was ready and willing to complete it, and deliver it to the defendants; yet, they not regarding their promise, but intending to injure and defraud him, did not nor would permit him to complete it, but, on the contrary, wholly discharged him from completing it, and refused to pay him either the 100*l.*, or to make him any compensation or remuneration whatsoever for the part which he had written, or for his loss of time, trouble, and expenses, &c.

The *second* count stated, that the defendants were indebted to the plaintiff in 100*l.* for work and labour, care, and diligence, in and about the composing and writing a *certain work* for them, and in and about the making of certain drawings; and also for journies and attendances relating to the business. The *third* count was similar, except that it was on a *quantum meruit*. Plea—The general issue.

From the evidence of Mr. Jerdan, the editor of the *Literary Gazette*, it appeared, that about September, 1830, the plaintiff, who was the author of several dramatic entertainments, was engaged by him, with the knowledge of the defendants, Messrs. Colburn & Bentley, who were the publishers of a work called “*The Juvenile Library*,” to write for that work an article to illustrate the history of armour and costume from the earliest times, for which he was to be paid 100 guineas. It appeared, that the plaintiff went into the country to Dr. Meyrick’s, a great proprietor of ancient armour, where he made various drawings; and also, that he had prepared a considerable portion of manuscript, when, after three volumes had been published, the *Juvenile Library* was discontinued. The plaintiff claimed

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a sum of 50 guineas for the part which he had prepared, and the trouble he had taken in the business.

Spankie, Serjt., for the defendants, contended, that the engagement, as set out in the declaration and also in point of fact, was an engagement to pay for the article when complete; and this the defendants always had been and still were willing to do.

He called a witness, who proved, that in the month of November a conversation took place between the plaintiff and the defendant Bentley, in which the latter told the former, that if he would finish his work he should have his money, as they were perfectly willing to publish it; that the plaintiff said it was better for a separate publication than for the Juvenile Library, as in treating it for children he had been very much hampered, and there was great difficulty in adapting it for juvenile comprehension.

Wilde, Serjt., in reply.—The defence set up is no answer to this action. It is one thing to write an article for an Encyclopædia or a Juvenile Library, and another thing to write a separate work on the subject; different styles of writing are required for children and grown persons. That which was written with ingenuity, adapted to young minds, would make a man ridiculous, if published for grown up persons; such, in this case, was not the contract made, and the defendants have no right to call on the plaintiff to publish on such terms. An author, also, has an interest beyond the mere payment for a particular article. The kind of work is to be taken into consideration, with reference to his reputation, and the effect it will have on his future performances.

Dodd, for the defendant, called his Lordship's atten-

tion to the fact, that the *second* count did not state that the article was to be published in the Juvenile Library, but was only a promise to pay 100 guineas for the article, which, it appeared from the evidence, the defendants had offered to do.

Wilde, Serjt.—The contract was to publish in the Juvenile Library, and that is sufficient.

TINDAL, C. J.—I do not think it turns upon the *second* count, but upon the *quantum meruit* in the *third* count.

His Lordship afterwards (in summing up) said—The plaintiff does not seek to recover the whole sum contracted for, but only a fair remuneration for that part of the article which he had prepared, and which was rendered useless by the discontinuance of the work in which it was to appear. The object of the defendants evidently was, to have a publication adapted to persons in the younger classes of society. The question you have to consider is, what degree of credit you give to the defence; which, it appears to me, must amount to this, or it amounts to nothing—That, after the contract was broken, an entirely new arrangement was made, to furnish the matter for publication in a separate form. It seems, that in the month of November the plaintiff thought that the subject was one better suited for separate publication; but undoubtedly, up to that time, he had been preparing it for juvenile readers; and the form and size of the proposed new work were not settled on that occasion. It might be, that the plaintiff considered the subject matter was better adapted for a separate publication, without admitting that the MS. and drawings already prepared were suited to such a publication. It will be for you to say, whether you think that this was a separate bargain, in which the plaintiff gave up the old contract altogether; for if you do, then you must find your verdict for the defendants. The question is, was the first agreement en-

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tirely abandoned with the consent of the plaintiff, and an entire new agreement made between the parties?—for only in such case can the verdict be for the defendants.

Verdict for the plaintiff—Damages 50%.

Spankie, Serjt., submitted that the verdict could not be taken on the *quantum meruit*, and that the special count did not accord with the evidence.

TINDAL, C. J., thought that the plaintiff might recover on the *quantum meruit*; but said, that he would take a note of the objection.

Wilde, Serjt., and *Kelly*, for the plaintiff.

Spankie, Serjt., and *Dodd*, for the defendants.

[Attornies—*Lithgoe*, and *Sharon & T.*]

A motion was made, but the Court refused a rule.

Adjourned Sittings at Westminster after Trinity Term, 1831.

June 17th.

GLENESTER v. HUNTER.

A member of a committee of management, taking an active part in the concerns of a charitable institution supported by voluntary contributions, is liable for goods

furnished by a tradesman for the use of the institution, although it appear that such tradesman did not furnish them on any contract with the committee, but, having at first furnished goods on the credit of an individual, who, previously to the formation of a committee, had the sole management, continued to send them in afterwards on orders given, as before, by the servants of the institution, without any inquiry as to who was liable to pay him.

ASSUMPSIT for goods sold and delivered. The plaintiff was a butcher, and the defendant one of the committee of managers of the Royal Western Hospital. The claim was for meat furnished for the use of the hospital from the 8th of May to October, 1829. The institution had at first

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been under the management of a person named Sleigh, on whose credit the plaintiff had for some time furnished goods, before any committee of the governors was formed; and it appeared that the goods in question were ordered by the servants of the hospital, in the same manner as they had previously been. The defendant became a member of the committee in March, 1829. The committee was in the habit of meeting about once a-month. At a meeting on the 6th of April, 1829, the defendant acted as chairman, and it appeared from the minutes (which were always signed by the chairman), that Mr. Sleigh called the attention of the committee to the advantage of purchasing provisions by wholesale, in which the committee concurred. Subscriptions to the institution were paid in to the account of the committee with a banker. The committee examined other tradesmen's bills, and ordered them to be paid, sometimes in full, sometimes in part only; and also engaged and discharged servants. On one occasion, when drugs were wanted, it was regularly moved and seconded that they should be bought; and, on another occasion, the form of a letter was agreed to, which was to be sent to the ground landlord of the premises, stating that if he would co-operate with the committee in procuring funds, they would take a lease on certain terms. The defendant attended at various meetings of the committee, during the period in which the plaintiff's demand accrued, and took an active part in the business. Mr. Sleigh was also a member of the committee, and originated most of the propositions which were adopted by the committee. The plaintiff's bill was headed "Mr. Sleigh's Hospital." Three receipts had been given for sums paid on account, one was "Received of Mr. Sleigh;" another "Received of Mr. Sleigh & Company, the Committee of the Royal Western Hospital," the words "Mr. Sleigh & Company" being struck through with a pen; and the third was "Received of the Governors of the Royal Western Hospital."

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Wilde, Serjt., for the plaintiff, contended, that although he was only a subscriber to a public charity, and had no personal interest in the subject matter, yet, as a committee man, he had the means of limiting the engagements of the institution, and also of being acquainted with the extent of its resources. When a tradesman sees respectable gentlemen managing a concern of this kind, may he not reasonably expect to be paid by them. The cases of *Cullen v. The Duke of Queensberry* (a), and *Horsley v. Bell* (b), establish the principle for which I contend.

Spankie, Serjt., for the defendant.—In point of law, when a man seeks to charge one of a number of persons having no interest in the matter, he must shew that those persons made the contract with him, or that he furnished the goods on their credit. *Cullen v. The Duke of Queensberry*, and *Horsley v. Bell*, differ from the present case; for, in both, the parties sued had made the agreement with the parties suing; and, in the latter case, much stress is laid upon the improbability of a tradesman making a contract on the credit of tolls, which it was in the power of the defendant to raise or not at pleasure. But, in the present case, there is no power to raise money.

Wilde, Serjt., in reply.—Though, under *Horsley v. Bell* and the other cases, I admit that persons may so limit

(a) 1 Brown's Chancery Cases, p. 101. The marginal note of this case is, "Committee of a voluntary society entering into agreements with tradesmen, for the whole, sufficient to make them parties to a bill, and not necessary to include all the subscribers."

(b) *Ib.* p. 101, n. *. This was a bill filed by the undertaker of a navigation at Thirsk in Yorkshire,

against the commissioners (named in the act of Parliament for carrying it on), who had signed the several orders. The principal question was, whether the defendants were liable in their private capacities, or the plaintiff had given credit to the fund; and it was held that they were personally liable.

their responsibility as to prevent their being made personally liable to a tradesman; yet, I contend also, under those cases, that when there is a committee receiving funds, paying money, meeting at stated periods, engaging and discharging servants, &c., it must be taken that they are liable, unless they have distinctly intimated to the tradesman that they do not intend to be personally answerable.

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TINDAL, C. J. (in summing up) said—This is an action for goods sold and delivered; and the question for you is, with whom was the contract for the sale and delivery of those goods made. But, when I say this, I do not mean the very individual who received the meat or gave the order, because, in all probability, it would be a menial; but you are to look and see who were the masters of those persons. It is not necessary that a tradesman should know, at the time of furnishing the goods, who the person was for whom they were obtained; but, if they are obtained by an agent, and it is afterwards found out that he had a principal, the tradesman may sue the principal. The question, therefore, will be in this case, whether the meat was supplied on a contract made, personally and individually, with Mr. Sleigh, or on the credit of the persons who managed this institution; for, if there are persons who manage institutions of this description, they make themselves liable for the orders given by their servants. The question therefore is, whether the committee did so conduct and hold themselves out as the managers and employers of the persons who gave the orders, as that any tradesman, at the time knowing this, might reasonably conclude that he was supplying his goods on their credit. It appears, that the defendant became a committee-man in March, 1829, and that the debt was incurred during the time that he continued so. The plaintiff rests his claim to a verdict on the acts of these persons, claiming, as committee-men, to control the proceedings. It appears that, on one occasion, Mr. Sleigh called their attention to

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the advantage of purchasing provisions by wholesale, in which the committee concurred—Why should they be interested in this matter, unless the funds, over which they had the control, were liable to the payments? The nature of the letter to the ground landlord seems to shew that the committee considered themselves as the persons who were to acquire the funds by which the concern was to be carried on. The examination of bills, and the signing of checks for payment, shew that the committee were not acting as if the concern was under the control of Mr. Sleigh only. In the case of drugs, it appears that a motion was made and seconded, that they be bought; and if the person who furnished them brought an action, there is no doubt that the committee who ordered must pay. The question is, whether you see any difference between articles ordered for the first time by the committee, and those things, which, being necessary for the ordinary support of the charity, had been at first furnished on the credit of Mr. Sleigh alone, and continued to be supplied without any alteration in the mode of ordering. If persons hold themselves out, they make themselves virtually liable, as much as if they actually made the contract; and the question is, whether these gentlemen, the defendant and others, did so act, as that they might be considered as the masters and employers of the servants by whom the goods were obtained. On the part of the defendant it was shewn, that, on some occasions, goods were paid for by Mr. Sleigh, which had been furnished by this very plaintiff; and the defendant says, that the plaintiff had no right, having begun on Sleigh's credit, to change: and undoubtedly he had not, if matters remained as they were. But, if Sleigh had left and parted with the concern, the plaintiff, if he went on supplying, might sue the new person, though at the time he did not know of the change. His Lordship, after further commenting upon the evidence, left the case to the Jury, who found a

Verdict for the plaintiff.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Spankie, Serjt., and *J. H. Lloyd*, for the defendant.

[Attornies—*Shuter*, and *Beechey*.]

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Vide the case of *Pink v. Scudamore*, post, p. 71.

DOE on the Demise of FINLAYSON v. BAYLEY.

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EJECTMENT, to recover possession of a house in Park Road, Regent's Park.

A witness proved, that he understood from the defendant, that he took the house of Mr. Finlayson, at three guineas *per* week. A notice was left with the maid-servant, at the house, on the 28th of July, 1830, requiring the defendant to quit possession on Wednesday the 4th of August.

Russell, Serjt., for the defendant, objected that the notice was not sufficient, as it did not appear that Wednesday was the expiration of the current week of the tenancy.

To remove this objection a witness was called, who said that he negotiated the letting of the house, with a person named Bradfield, who had often acted as agent for the defendant; and that he gave Bradfield possession about nine o'clock, and the defendant came about ten. It was then proposed to read a letter written by Bradfield.

Russell, Serjt., asked his Lordship, whether he thought the evidence of agency was sufficient?

In ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, the 4th of August. The witness who was called to prove that Wednesday was the expiration of the current week of the tenancy, said, "that he guessed" the defendant came in "about a Tuesday or a Wednesday, but had no recollection which:"—*Held*, insufficient.

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TINDAL, C. J.—I think it is, the time is so near. Bradfield taking possession at nine, and the defendant coming at ten, there was no time for any intermediate letting.

The witness then said, that the house of which he spoke was not the house in question, but another, a few doors off, which the defendant occupied for eight months, and then removed to the house in question; he guessed that it was about a Tuesday or a Wednesday that he removed, but he had no recollection which. It appeared that Bradfield's letter related to the first house only.

Russell, Serjt.—This evidence does not supply the deficiency. According to the man's statement it is a guess whether it was Tuesday or Wednesday.

TINDAL, C. J.—It seems to me that there is nothing to leave to the Jury; but I will take any evidence which the plaintiff has to offer.

Wilde, Serjt., for the plaintiff, said that he did not think that the evidence could be carried any farther.

TINDAL, C. J.—Then the plaintiff must be called.

Nonsuit.

Wilde, Serjt., and **Kelly**, for the plaintiff.

Russell, Serjt., for the defendant.

[Attornies—*Fielder*, and *Coe*.]

See the case of *Doe dem. Campbell v. Scott*, 4 Moore & Payne, 20.

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THWAITES v. SAINSBURY.

ASSUMPSIT for goods sold and delivered.

By a rule of Court, obtained by consent, it was ordered that the defendant should admit the plaintiff's case.

Manning having opened the pleadings—

Spankie, Serjt., for the defendant, claimed the right to begin.

Bompas, Serjt., for the plaintiff, resisted it.

TINDAL, C. J.—I am of opinion that the plaintiff's counsel has a right to begin and state the case. It is not like the case of an issue, proof of the affirmative of which lies on the defendant.

Bompas, Serjt., and *Manning*, for the plaintiff.

Spankie and *Andrews*, Serjts., for the defendant.

[Attornies—*Bebb* and *G.*, and *Hartley*.]

As to the right to begin, see the cases of *Rex v. Yeates*, Vol. 1 of these Reports, p. 323; *Cooper v. Wakley*, Vol. 3, p. 474; *Cotton v. Jones*, Ib. p. 505; *Curtis v. Wheeler*, Vol. 4, p. 196; *Williams v. Thomas*, Ib. 234; and *Turberville v. Patrick*, Ib. 557; and the cases respectively there referred to.

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Practice.—The plaintiff's counsel has a right to begin and state the facts, although by a rule of Court the defendant is under obligation to admit the plaintiff's case.

DAVIES and Others v. HALTON.

June 21st.

ASSUMPSIT for goods sold and delivered. Pleas—*non assumpsit*, tender, and set off.

Semble, that there is not any custom in the cloth trade, by which a tailor, who receives

cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shews that he has delivered it to the seller's order in writing.

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The plaintiffs were clothiers in Gloucestershire, and the defendant a tailor in London.

There was a dispute between the defendant and the London agents of the plaintiffs as to two ends of cloth, which the defendant had delivered without any written order to a person, who, it was alleged, was in the employ of those agents, and who had pawned the cloth instead of carrying it to them. There was contradictory evidence as to the employment; but it was insisted on the part of the plaintiffs, that there was a custom in the trade never to return goods without a written order from the party who had sent them in. To prove this three witnesses were called; two of them said, that it was always the custom for a written order to be given; and the third stated, that it was the practice of the plaintiffs' agents, and of another house in the trade, but he did not know whether it was of any more.

Storks, Serjt., for the defendant.—The custom is not proved. If it was the practice of the agent's house, there is no evidence that it was communicated to the defendant. It is the tradesman's duty, if there be a particular practice, to communicate it. There does not appear to have been any previous dealing between the parties from which it might be known. Then, if the practice is relied on as amounting to a general custom of the trade, it is absurd. Is it to be argued that goods are never to be returned without a written order? Trade cannot be carried on if such is to be the rule.

On the part of the defendant much evidence was given as to the agency of the person to whom the two ends of cloth were delivered; and a witness in the trade proved that, in cases where he knew the porter, he had delivered back goods without any written order.

The question in the cause was at last narrowed to the point as to the two ends—and

TINDAL, C. J., left it to the Jury to say, first, when they were delivered back; and secondly, whether they were delivered to a duly authorized agent.

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The Jury found for the defendant, thereby establishing the agency, and of course negating the existence of the custom relied upon by the plaintiffs.

Wilde, Serjt., and *Steer*, for the plaintiffs.

Storks, Serjt., and *Thesiger*, for the defendant.

[Attornies—*Thornbury*, and *Locke*.]

See as to customs of trade, &c., p. 595; *Handasyde v. Wilson*, Vol. 3, p. 528; and *Bleaden v. Hancock*, Vol. 4, p. 152.
Wood v. Wood, Vol. 1 of these Reports, p. 59; *Sawell v. Corp*, Ib. 392; *Hogarth v. Jackson*, Vol. 2,

PINK v. SCUDAMORE, HICKS, and SLEIGH.

June 22nd.

ASSUMPSIT for builder's work done at a projected hospital, called "The Western Hospital." The defendant Hicks pleaded the general issue, and the other defendants suffered judgment by default.

It appeared that Mr. Sleigh, one of the defendants, had projected the hospital as a charitable institution, at which the other defendants were to be physician and surgeon, and to deliver lectures. To shew a joint liability to the present demand, workmen were called, who proved that all the three defendants consulted together, and gave directions to the workmen as to various things for the accommodation of the patients; and that, by the permission of the provisional committee, the defendant Hicks had drawn checks for some medicines for the patients of the hospital,

If a builder do work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only.

to be on the terms of looking for payment to the funds of the hospital only.

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and also a check for 10*l.*, the proceeds of which had been paid to the plaintiff. All the defendants were members of the provisional committee for managing the intended hospital.

Spankie, Serjt., for the defendant Hicks.—If persons engage in a commercial speculation, it may be inferred that the parties who are to participate in the profits are to be liable for the expenses; but, in a work of charity, it is clear, that the parties, if medical men, devote their time, and if not so their subscriptions to the charity; but no one is deceived; the persons who deal with them knowing that they look for payment to the sums subscribed. The defendants, it is true, gave directions as to the accommodation of the patients; that was mere advice, but no order. This is not like the case of a person giving directions about the house he is himself to inhabit. If a seaman came on board a ship, and, seeing any thing that he did not approve of, were to say, pull down that bulk head, would that make him liable to the ship builder? In the building of this Court my learned brother and myself suggested many alterations, but no one ever thought of making us liable to pay for it. Could it be supposed that the plaintiff worked at the hospital on the credit of the physician and the surgeon. It is known that the committee of a charitable institution are constituted to take care of the funds subscribed, and not to be liable to the tradesmen. Committees of trading companies act for gain, but the committees of charitable institutions do not. That, therefore, excludes the inference that things are done on their credit: the inference that arises where the parties act for gain being excluded.

TINDAL, C. J., (in summing up)—The question here is, whether there was any contract by all these three defendants. Where no one is present at the making of any contract, and there is no correspondence, a Jury must look at the facts, to see who the contractors are; and they must

look at the acts of the parties while the work is going on. The plaintiff relies on the fact of the defendants giving orders; and he also says, that if there was any profit, the defendants were jointly to derive it, as they were to give lectures; and it is shewn that Mr. Hicks made a payment for part of the plaintiff's claim. On the part of Mr. Hicks it is contended, that the design originated with Mr. Sleigh; and that all that Mr. Hicks did was as a surgeon, to carry on the objects of the hospital. The defendants, no doubt, thought the funds of the hospital would be sufficient to exonerate them, but still the tradesmen are not bound by that, unless they were distinctly told that they were to deal on the terms of looking to the funds of the hospital only.

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Verdict for the plaintiff.

Wilde and Jones, Serjts., and R. V. Richards, for the plaintiff.

Spankie and Storks, Serjts., and Godson, for the defendant Hicks.

[Attornies—*Shuter, and Hill.*]

See the case of *Glenester v. Hunter, ante, p. 62.*

COLLIER, M. D., v. SIMPSON.

June 23rd.

SLANDER. The declaration stated, that the plaintiff was a physician, and that the defendant spoke certain words, imputing that the plaintiff had prescribed improper medicines for a child. Pleas—General issue, and several pleas of justification, stating that the plaintiff prescribed corrosive sublimate in too large doses. Replication—*de injuriâ*.

It appeared that the complaint under which the child laboured was water on the brain.

Slander.—The words imputed the prescribing of medicines in improper doses, and the defendant justified:—*Held*, that medical books, which were stated by the medical witnesses to be works of medical authority,

could not be put in, to shew that such doses were sanctioned; but, that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books as a part of their general knowledge.

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Wilde, Serjt., proposed to shew that the prescriptions were proper, and the doses not too large; and wished to put in medical books of authority, to shew what was the received opinion in the medical profession.

TINDAL, C. J.—I think I cannot receive medical books.

Wightman.—When foreign laws are to be proved, it frequently happens that a witness produces a foreign law book, and states it to be a book of authority.

TINDAL, C. J.—Physic depends more on practice than law. I think you may ask a witness, whether, in the course of his reading, he has found this laid down.

Sir H. Halford, the President of the College of Physicians, was called. He stated that he considered the medicine proper, and that it was sanctioned by books of authority. He stated that the writings of Dr. Merriman and Sir Astley Cooper were considered of authority in the medical profession.

Bompas, Serjt.—I submit that medical books cannot be cited—more especially those of living authors. Sir Astley Cooper and Dr. Merriman might be called.

Wilde, Serjt.—I wish to shew that these books are acted upon by persons in the medical profession.

TINDAL, C. J.—I do not think that the books themselves can be read; but I do not see any objection to your asking Sir Henry Halford his judgment, and the grounds of it, which may be, in some degree, founded on books, as a part of his general knowledge.

Verdict for the plaintiff—Damages, 40*s*.

Wilde, Serjt., and *Wightman*, for the plaintiff.

Bompas, Serjt., and *Kelly*, for the defendant.

[Attornies—*Mayhew & Co.*, and *Lonsdale*.]

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HEWITT v. PIGGOTT, Esq.

June 23rd.

ACTION against the Sheriff of Somersetshire for a false return of *nulla bona* to a writ of *fi. fa.*, issued upon a judgment obtained in Easter Term, 1828, against the Earl of Egmont, upon a bond debt for 4000*l.*

The defence was, that in 1824 the whole of the property of the noble Earl was conveyed to trustees for the benefit of creditors; and, that although the plaintiff had not in fact executed the deed, his debt, upon which the judgment was obtained, was inserted with the others in the deed; that he was fully acquainted with this arrangement at the time, and had requested, that payment might be made out of the trust funds of a bill of exchange drawn by him upon the Earl of Egmont for 300*l.*, and had written various letters expressing his wish to have debentures for his debt like the other creditors, according to the provisions of the deed.

It appeared that a bill of discovery had been filed in Chancery, on the part of the Earl, against the plaintiff Hewitt, and that his answer contained a schedule of letters in his possession from the Earl and other persons relating to these transactions. An order or decree was subsequently made in the suit, requiring the present plaintiff to bring all the said letters, papers, &c., mentioned in his answer, into the proper office of the Court, to be deposited there.

A. brought an action against the Sheriff for a false return of *nulla bona* to a *fi. fa.* issued against the goods of B. B. had filed a bill of discovery against A., on which there had been a decree or order, that A. should bring into the Court of Chancery all letters written by B. or any other person to him respecting the original debt. A., under this decree or order, brought in various letters:—*Held*, that none of them could be read in evidence on the part of the defendant in the present action, without first putting in the bill and answer.

Wilde, Serjt., for the defendant, proposed to put in this order, with a view to introduce a letter written to the pre-

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sent plaintiff, which had been so deposited by the plaintiff under it.

Cross, Serjt., objected, that, to make any part of the proceedings in equity evidence in this cause, the bill and answer must be put in, upon which the order in question was founded; and that it was not competent to the defendant to select a particular document, which might bear a very different interpretation from its *prima facie* import, when explained by the other parts of the proceedings to which it related.

TINDAL, C. J.—The object of putting in this order is merely to introduce a letter which it is alleged the plaintiff produced from his own custody, and placed in the Six Clerks' Office. I think the order is admissible of itself, being an act of the Court, not affecting the rights of either of the parties; but it is another question whether the letter can be given in evidence.

The order was then read.

A clerk from the Six Clerks' Office then produced several bundles of letters and papers as having been deposited there under the said order, from among which the letter in question was taken.

Cross, Serjt., objected to its being read, unless the bill and answer, of which this letter was in fact made a part, either by being set out in the answer, or being therein referred to and described, were also read. It might be the fact, that the present plaintiff had, in his answer in Chaucery, given such explanations with respect to the letter, as would destroy or materially alter the effect for which it was attempted to give it in evidence on the other side.

Wilde, Serjt.—The letter is not written by the present

plaintiff, and, therefore, it cannot be made evidence against him in the ordinary way, by proof of the handwriting. But it appears, by the order, that it has been in his possession for a considerable time, and it may be inferred that he is not only well acquainted with its contents, but has acted upon it. He will have full opportunity of giving any fair and legitimate explanation of its contents here, which he may have given in his answer in Chancery; and the defendant ought not to be required to put in the whole proceedings, by which he would probably have to produce as his evidence the partial statements of the plaintiff in his own favour, which have nothing to support them.

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TINDAL, C. J.—The letter cannot contain any statement made by the present plaintiff himself at the time it was written, because it is a letter written and sent to him. It is not proposed to put in with it any letter in reply, written by the present plaintiff; but, it may be that his answer in Chancery contains such a contradiction or explanation of any parts of the letter which may seem to bear against his right to recover in this action, as will at once wholly neutralize its effect. I think, therefore, that the letter is inadmissible without the bill and answer.

The letter was not read.

Verdict for the defendant.

Wilde and Jones, Serjts., and *Follett*, for the plaintiff.

Cross, Spankie, and Andrews, Serjts., and *Steer*, for the defendant.

[Attornies—*Vines & A.*, and *R. Hill*.]

See the case of *Fairlie v. Denton*, Vol. 3 of these Reports, p. 103.

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*Adjourned Sittings in London after Trinity
Term, 1831.*

BEFORE LORD CHIEF JUSTICE TINDAL.

July 2nd.

BUDD v. FAIRMANER.

A receipt on the sale of a colt contained the following words after the date, name, and sum, "for a grey four years old colt, warranted sound in every respect:"—
Held, that such part as related to the age was a representation only, and not a warranty.

THE declaration stated, that in consideration that the plaintiff would deliver to the defendant a certain mare, and also pay him 10*l.* in exchange for a certain colt, the defendant *undertook*, and then and there faithfully promised *that the said colt was then and there a four years old colt.* It then averred that the plaintiff delivered the mare and paid the 10*l.*, "yet the said defendant, contriving and fraudulently intending to injure the said plaintiff, did not perform or regard his said promise and undertaking, but thereby craftily and subtilly deceived the said plaintiff in this, (to wit) that the said colt, at the time of the making of the said promise and undertaking of the said defendant as aforesaid, was not a four years old colt, but on the contrary thereof was much less than a four years old colt, (to wit) a three years old colt, whereby the said colt became and was of no use or value to the said plaintiff," and whereby also the said plaintiff "was put to great charges and expense in feeding, keeping, and taking care of it," &c.

The action was brought to recover the expense of keeping the colt mentioned in the declaration for a year, it being contended, on the part of the plaintiff, that the defendant *warranted* the colt to be, at the time of the bargain for it, a four years old, whereas, in point of fact, it was only a three years old. When the bargain was made, the following receipt was signed by the defendant—

"Received, August 4th, 1830, of Mr. Budd, ten pounds for a grey four years old colt, warranted sound in every respect.
John Fairmaner."

From the evidence of several veterinary surgeons it appeared, that, on the 4th of August, 1830, when the colt was sold, it was only a three years old, and could not be strictly called a four years old till the 1st of May, 1831; but they admitted, on cross-examination, that by four years old was sometimes meant three off or rising four, and sometimes four off or rising five. They said also, that till it was actually four years old, it was not suitable for a carriage horse, as which it appeared the plaintiff meant to use it.

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Andrews, Serjt., for the defendant, contended that the plaintiff must be nonsuited, as there was no evidence of any warranty that the colt was a four years old colt: the warranty, according to the terms of the receipt, being confined to the soundness; and the other part being description only. He referred to *Richardson v. Brown* (a).

Wilde, Serjt., for the plaintiff.—The case of *Richardson v. Brown* is distinguishable from the present, as there the warranty was separate from the rest of the contract. There are numerous cases which shew that where a man sells an article of a given description, he warrants it to be of that description (b).

TINDAL, C. J.—I am of opinion that the first part of the receipt contains a representation, and the latter part a warranty. In the case of a representation, to render liable the party making it, the facts stated must be untrue to his knowledge; but in the case of a warranty, he is liable whether they are within his knowledge or not (c). The plain-

(a) 1 Bing. 344; and 8 J. B. Moore, 338. The words relied upon in that case were, "To be sold, a black gelding five years old, has been constantly driven in the plough—Warranted." And it

was held that the warranty was only of soundness.

(b) *Vide* the cases referred to in the argument in banc.

(c) *Vide Salmon v. Ward*, Vol. 2 of these Reports, p. 211.

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tiff has not made out his case as stated in the declaration, and therefore he must be called.

Nonsuit.

Wilde and *Spankie*, Serjts., and *Kelly*, for the plaintiff.

Andrews and *Russell*, Serjts., and *Erle*, for the defendant.

[Attornies—*Sylvester & W.*, and *D. Willoughby*.]

IN the ensuing Michaelmas Term, *Wilde*, Serjt., obtained a rule nisi for setting aside the nonsuit. He cited on the motion the cases of *Gardiner v. Gray* (a); *Bridge v. Wain* (b); and *Yeates v. Pim* (c).

Nov. 13th.

On a subsequent day in the term, *Andrews*, Serjt., shewed cause.—The nonsuit was right. The language of the receipt is decisive, it warrants the soundness only. In moving for this rule it was argued, that every representation amounts to a warranty. But the cases cited do not

(a) 4 Camp. 144. That case decides, that where, before or at the time of sale, a specimen of the goods is exhibited to the buyer, if there be a written contract, which merely describes the goods as of a particular denomination, this is not a sale by sample; but there is an implied warranty that the goods shall be of a merchantable quality of the denomination mentioned in the contract.

(b) 1 Stark. N. P. C. 504. That case decided that where goods were described in the invoice as scarlet cuttings, a warranty was to be inferred that they answered the known mercantile description

of scarlet cuttings.

(c) 2 Marsh. 141; 6 Taunt. 446; Holt, 95. That case decides that an usage of trade cannot be set up in contravention of an express contract. It was a case in which A. agreed to sell to B. a quantity of prime singed bacon, which B. weighed and examined and paid for by a bill at two months, but before the bill became due, he gave notice to A. that the bacon did not answer the contract. And it was held that B. could not give in evidence a custom that the buyer was bound to reject the contract, if at all, at the time of examining the goods.

bear out that position. As to *Gardiner v. Gray*, that was the case of waste silk in a sale note, which turned out not to be marketable; and it was held, that it ought to have been. With respect to *Bridge v. Wain*, the case of the scarlet cuttings, the cuttings differed much, some being marketable and others not, and a warranty of their being marketable was implied. In the case of *Yeates v. Pim*, which related to prime singed bacon, it was only held that no custom of trade could be set up in contradiction of a written description. But this case turns upon the words of the receipt. *Richardson v. Brown* is in point, in our favour. There was also a case of *Dickinson v. Gapp*, tried in the Common Pleas, at the adjourned sittings in London after Hilary Term, 1821, in which the receipt given was in these words: "September 7th, 1820, Received of Robert Dickinson 100*l.*, for a bay gelding, got by Cheshire Cheese, and warranted sound." According to the evidence, it appeared that the gelding was not got by Cheshire Cheese, but the defendant believed that it had been. *Dallas, C. J.*, held that it was a representation merely, and that the warranty was confined to the soundness. That case is precisely in point with the present. The cases of *Jendwine v. Slade* (a), and *Williamson v. Allison* (b), go to shew that a representation does not bind, unless it is known to be false. With respect to the colt's being useful or not, that was a matter which both parties could judge of.

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ALDERSON, J.—Where a vessel was sold as a copper fastened vessel, to be taken with all faults, and it turned out not to be copper fastened, it was held that the warranty was broken.

Andrews, Serjt.—The written receipt shews clearly what the intention was.

(a) 2 Esp. 572. That case decides, that the putting down the name of an old artist in a catalogue as the painter of a particular

picture, is not such a warranty as will subject the seller to an action.

(b) 2 East, 446.

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Russell, Serjt., on the same side.—The cases of *Gardiner v. Gray*, and *Yeades v. Pim*, were cases of a general contract to supply an article of a given description; and it was held, that the article supplied must answer that description. Those decisions only shew that a purchaser is entitled to an article which is saleable in the market, according to the description given. But in this case there is an *express* warranty as to the part intended to be warranted. The principle to be extracted from *Dunlop v. Waugh (a)*, and *Jendwine v. Slade*, as applicable to this case, is, that what a man says about the age of a horse at the time of the sale, may be information given according to his belief only. The receipt shews the warranty to be confined to soundness. According to the evidence of Mr. Sewell, at the trial, it appears that the phrase “four years old” varies in its meaning.

ALDERSON, J.—Unless it were sold on its birth day it never could be sold as exactly four years old.

Wilde, Serjt., in support of the rule.—I mean to contend, that this is a warranty that the colt was a grey four years old colt. If a man sells a horse as an entire horse, or as a mare or a gelding, has not the purchaser a right to claim a horse answering the description? The colt was bought to match, and it was bought also for use. Now, if it was not grey it would not match, and if it was not four years old, it was too young for use. Supposing it to be a running horse, the age would be of importance. If the word “warranted” was not used, would not the description amount to a warranty? No particular words are necessary to constitute a warranty. The cases as to scarlet cuttings and waste silk were cited, not to shew that the things must be

(a) *Peake*, N. P. C. 123. That case decides, that “it is not a warranty to sell a horse as of the age stated in a written pedigree, if at the time the seller declared that he knew nothing of the horse’s age, but what he learned from the written pedigree.”

marketable, but that they must answer their description. The words, "*Riga* hemp" and "*Prime yellow Dantzic* tallow," have been held to amount to a warranty. What would otherwise amount to a warranty may be cut down by something subsequent; but it must be something relating to the same matter, and not to a wholly different matter. Where words amount to a warranty, and afterwards there is an express warranty, the implied warranty will not be cut down thereby. Selling a thing as of a given description, is a warranty that it is of that description. If a horse is sold as "a perfect horse, warranted sound," because he is warranted sound he is not to be the less a perfect horse. The description in this case is of a four years old colt; and the mention of the age at all shews that it was material. With respect to ships, if a ship be stated to be "American," or "copper-fastened," that description will not be affected by a subsequent warranty to sail before a given day. The word "American" might imply a warranty of neutrality, and so become material.

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ALDERSON, J.—A warranty must be complied with, whether it is material or not; but it is otherwise as to a representation.

Wilde, Serjt.—The case of *Shepherd v. Kain* (a), is important in my favour, for there a ship was sold "as a copper-fastened vessel," but it was to be taken with all faults; and yet it was held that the purchaser had a right, under those words, to have a vessel entirely copper-fastened.

(a) 5 B. & A. 240. According to that case, where an advertisement for the sale of a ship described it as "a copper-fastened vessel," adding, that it was to be taken with all faults, without any allowance for any defects whatsoever; and it

appeared that the ship was only partially copper-fastened, it was held, that the description amounted to a warranty, and that the vendor was liable as for a breach of it, notwithstanding the words "with all faults," &c.

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Spankie, Serjt., on the same side.—If there had been no warranty added, the words, “a grey four-years old colt,” would have been clearly a warranty. The maxim, “*expressum facit cessare tacitum*,” applies only where both warranties are of the same matter. But warranties are divisible; and in this case there is a division between the express and the implied warranties. The case of *Gray v. Cox* (a) is also in point.

TINDAL, C. J.—In this case there is a written instrument to shew the contract. We are to interpret according to the proper construction from the face of the instrument; and it appears to me that the intention was to confine the warranty to the soundness; and that what precedes the warranty is a description or representation only. What a man warrants, he must make good, whether he knew the fact or not. But for what he represents, if there is a latent defect, and he acts *bond fide*, he is not answerable. In the case of *Parkinson v. Lee* (b), Mr. Justice *Lawrence* draws the distinction between a warranty and a representation. In the present case, as it appears to me, the purchaser takes a warranty as to the soundness, and takes the age upon representation. As to the merits, there is different evidence with respect to the meaning of the term “four years old,” it being in some cases *rising four*, and in others *four off*. I use this fact for the purpose of shew-

(a) 6 D. & R. 200; 4 B. & C. 108; and 1 C. & P. 184. “If an article is sold for a particular purpose, and at the usual market price, and it turns out to be defective, an action is maintainable against the seller, though there was no warranty at the time of the sale.” But see the observations there, as to the form of such action.

(b) 2 East, 314. That case decides, that upon a sale of hops by the sample, with a warranty that

the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and, therefore, if there be a latent defect unknown to the seller, arising from the fraud of the grower of whom he purchased, such seller is not answerable, though the hops turn out to be unmerchantable.

ing that the terms may have a varying construction; and, therefore, one part may be warranted, and the other not. The case of *Browning v. Wright* (a) shews the limitation of an express warranty. *Shepherd v. Kain* was decided on the ground that there was not any express warranty. *Richardson v. Brown*, and *Dickinson v. Gapp*, are directly in point. I am of opinion that the rule must be discharged.

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GASELEE, J., concurred.

BOSANQUET, J.—We must construe this instrument according to the intention of the parties. Where a party sells by a sale note, he must sell such an article as the sale note expresses. So, in a policy, the introduction in the margin of the word “American,” or “neutral,” may mean that it is intended to warrant those facts. What is the instrument in question? It is not a sale note, but a receipt given upon a sale. Can we infer from the terms used in the commencement of the receipt that there is a warranty as to the age? It seems to me, that *Richardson v. Brown* and *Dickinson v. Gapp* are decisive on this point.

ALDERSON, J.—As at present advised, if the word warranted had been the last word, I should have held that it extended to the whole. But here, I think it is confined to the soundness only.

Rule discharged (b).

(a) 2 Bos. & Pul. 13.

(b) See, in addition to the cases cited in the argument, *Geddes v.*

Pennington, 5 Dow, 164, and those collected in Harrison's Index, Vol. 2, pp. 422 to 425.

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BEFORE MR. JUSTICE BOSANQUET.

(Who sat for the Lord Chief Justice.)

July 4th.

ELTON v. LARKINS.

It is not necessary to defeat an action on a policy of insurance on a ship, on the ground of concealment of material facts, *fraud* that should be made out; but it is enough, if the information be withheld, although the party withholding may only have *erred* in judgment.

In general, it is not necessary, that the assured should communicate the time of sailing, yet, if it be such as to make the ship a missing ship, then it becomes a material fact, and should be communicated.

Whether underwriters at Lloyd's must be taken, under all circumstances, with reference to insurances, to be cognizant of the contents of the foreign lists filed in the reading room there—*Quære*.

THIS was an action on a policy of insurance of the ship *Fanny*, on a voyage from Cadiz to London, with liberty to touch at Exmouth.

From the evidence given at first, on the part of the plaintiff, it appeared that the insurance was effected on the 29th of December, 1828, though the date of the policy was in January, 1829. The plaintiff's son swore, that his father, on the 29th December, told the broker, that the ship was to sail on the 23rd of November, and asked him if he had done anything as to the insurance; that the broker said, there was no risk in it—that he would take it himself for ten guineas, and that he could get it done at from 25s. to 30s. The same broker was concerned in freighting the vessel on an intended voyage from London to St. Michael's, after she should return from Cadiz.

A waiter from the reading-room at Lloyd's proved that lists, containing accounts of the sailing, &c., of vessels from foreign ports, came by the post, and were filed, which lists the underwriters were in the habit of looking at; and, that the defendant attended in the reading-room most days. A list was put in, which arrived at Lloyd's, from Cadiz, on the 22nd of December, it contained an account of the sailing of the *Fanny* from that place, on the 25th of November. A witness was also called, who stated that a vessel varied in coming from Cadiz to London from twenty to fifty days, and that the time was always very uncertain.

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Spankie, Serjt., for the defendant.—The plaintiff, the owner of the ship, was in possession of important information, which, if the underwriter had also been possessed of, he would either have declined the insurance altogether, or have undertaken it at an increased rate. The plaintiff did not communicate this to the underwriter, and therefore he cannot recover on the policy. The law clearly is, that the effect of not communicating information, does not depend upon whether the party in possession of it considered it important or not, but whether it turns out to be so in the opinion of a Jury. This was decided in the case of a life policy in *Von Lindenau v. Desborough* (a). The plaintiff had received a letter from his captain, containing important information as to a vessel called the *Traveller*, which sailed from Cadiz on the 22nd of November, and was driven into Kinsale, in Ireland, in great distress. On the part of the plaintiff, reliance is placed upon the fact, that there are lists at Lloyd's which may be referred to. But is it to be argued, that an underwriter can be expected to look at these lists with reference to vessels with which he has no connection, and in the fate of which he has no interest; especially when it may be in a language which perhaps he does not understand?—at all events, the circumstance of there being such lists is not sufficient to excuse the plaintiff, who had the information in his pocket, from communicating it to the broker. The letter of the captain contains these words—"I have now to inform you, that the last boat from — & Son is now alongside, which completes the cargo; and I am in great hopes to sail from here to-morrow, or Sunday morning, the 23rd. One vessel sails to-morrow direct for

(a) Vol. 3 of these Reports, 353. That case, *inter alia*, decides, that if the assured, at the time of effecting the policy, conceals anything, which it is material for the insurer to know, the

policy is void; and it makes no difference whether the assured considered it material or not; and what amounts to a misrepresentation or to a material concealment, is a question for the Jury.

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London, the schooner Traveller having been detained thirty days." Now, this, I submit, was a most material letter to be communicated; and if it had been communicated on the 29th of December, the broker would have known when the ship was expected to sail, and he would have known also when the Traveller sailed, and might have found out that she was in distress. The Fanny was, in fact, a missing ship, and out of time on the 29th of December, when the policy was effected. The plaintiff wished to be his own insurer, and to take the risk, and he did it as long as he could. If the time of sailing had been communicated by shewing the letter, it would immediately have appeared to any intelligent underwriter, that the ship was out of time. The case of a fifty-days passage is an extreme case, which does not enter into averages; the witness who proved it, admitted that thirty days was the average time, and reckoning from the 23rd of November, the day mentioned in the letter, it would have been more than thirty days. The vessel also was to touch at Exmouth, and her arrival there would be six days earlier than her arrival in London, and would be known in London by the post.

On the part of the defendant, several underwriters were called; and from their evidence it appeared, that it was not the practice at Lloyd's to consult the foreign lists, unless some particular circumstance rendered it desirable; and that, with reference to the ship in question, if they had been told the day at which she was expected to sail, they would have inspected the lists, but not otherwise.

It was also proved, that a vessel called the William sailed from Cadiz on the 30th of November, and arrived in London on the 16th of December; that the Traveller sailed from Cadiz on the 21st of November, and was towed dismasted, by a steam-boat, into Kinsale, in Ireland; on the 20th of December. The underwriters who

gave evidence, admitted that the length of the voyage was very uncertain; but that, judging from the circumstances of the arrival of the *William*, and the distress of the *Traveller*, they should have thought the *Fanny* a missing ship on the 29th of December, and would not have insured her at the rate in question.

The broker who effected the policy was also called. He denied that, at the time of the insurance, any thing was said by the plaintiff as to the time of sailing, or as to any letter he had received from his captain; but stated that, about the second week in January, he asked the plaintiff when he expected the *Fanny*, and his reply was, that he had been expecting her every day for some days past; that he then asked him, what his last communication was respecting her, upon which he took from his pocket the letter of her captain, dated the 21st of November—which he, the broker, read, and then said: “This letter ought to have been communicated to me at the time of effecting the insurance;” to which the plaintiff replied, that he did not consider it material, otherwise he should have done so. On his cross-examination, he admitted that he did not apply to the underwriters to put their names on the policy till the end of January, some time after he had seen the letter in question. He denied that he had ever said, that the underwriters had not a leg to stand on.

To contradict him in this, two witnesses were called, one of them the plaintiff's son, who in addition stated, that, in a conversation with his father, a few days after the insurance, the broker had said, “I find the ship sailed on the 25th, and not as you told me on the 23rd.”

Wilde, Serjt., in reply.—*First*, if the underwriters know a fact, the assured need not tell it them; and, *secondly*, if they provide the means of gaining that knowledge, and it is their duty as men of business to resort to those means, and they do not, the case is the same. In *Friere*

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and *Another v. Woodhouse (a)*, it was considered that it was not a concealment, to withhold a fact which was mentioned in Lloyd's lists; and that case is in point here. The underwriters, if they want to know when a vessel sailed, should ask the question. The lists are kept for the purpose of giving information; and if they give it, it is the same as if the assured gave it. In this case, all the information that was requisite, was to be found in the lists—and it was not necessary that the letter should be communicated.

BOSANQUET, J., (in summing up), said—The only question is, whether or not the plaintiff has withheld a letter, the communication of which was necessary, to put the parties to this insurance upon a fair and equal footing. It seems that the vessel sailed from Cadiz on the 25th of November; and that the first communication on the subject of the insurance took place on Friday, the 26th of December. There was a further conversation on Saturday the 27th, and on Monday the 29th the insurance was effected by the broker; and the question is, whether the passage in the captain's letter, which has been read, ought or ought not to have been communicated by the plaintiff to the broker, it being admitted that the letter itself was not communicated, though there is a contradiction in the evidence as to whether the time of sailing was mentioned. It has been truly said, that it is not necessary, in order to establish a concealment which will defeat the policy, that *fraud* should be made out; but it will be enough, if it is a material communication, that it was withheld, although the party may have only *erred* in so doing. The question as to whether it was material in this case, rests upon two grounds: the *first*, as to the day of sailing of the vessel in question; and the *second*, as to

(a) Holt's N. P. C. 572; see also *Durrell v. Beverley*, Id. 283, and the cases there collected.

the expected day of sailing of the Traveller. Generally speaking, it is not necessary that the assured should communicate the time at which the vessel sailed; it has been so determined; but, if the time be such as to make the ship a missing ship, then it becomes material. Neither is it necessary for the assured to communicate such facts as lie properly within the knowledge of the insurer. According to the evidence for the plaintiff, the expected time of sailing was communicated before the insurance was effected. But this is denied in the evidence for the defendant. It seems that in Lloyd's lists, there was an account of the sailing of the vessel in question, on the 25th of November.

His Lordship left the contradictory evidence to the Jury, who found their

Verdict for the plaintiff.

Wilde, Serjt., and *Maule*, for the plaintiff.

Spankie, Serjt., and *Barnewall*, for the defendant.

[Attornies—*Oliverson & Co.*, and *Blunt & Co.*]

EVERETT and Others v. LOWDHAM and Another.

July 4th.

ASSUMPSIT on a guarantie given to secure advances of money made during an election for members of Parliament for the borough of Camelford.

Spankie, Serjt., for one of the defendants, applied to have the witnesses ordered out of Court, with the exception of the attorney who instructed him, and who had been subpoenaed on the part of the plaintiffs.

Wilde, Serjt., for the plaintiffs, objected to the attorney's remaining.

A defendant's attorney, who has been subpoenaed on the part of the plaintiff may, at the desire of his counsel, remain in Court during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw.

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Russell, Serjt., who was with *Spankie*, Serjt., suggested, that if the objection were to prevail, it would always be in the power of one party to deprive his opponent of the assistance of his attorney by subpoenaing him as a witness. The case of *Pomeroy v. Baddeley*, reported in R. & M. 430, was referred to, in which Mr. Justice *Littledale* excepted the attorney in the cause from a general order for the witnesses to withdraw, on a statement by counsel that he could not conduct the case without his assistance.

BOSANQUET, J., under the circumstances, allowed the attorney to remain in Court.

Wilde and *Jones*, Serjts., and *D. Pollock*, for the plaintiffs.

Spankie and *Russell*, Serjts., and *Tomlinson* and *Butt*, for the respective defendants.

[Attornies—*Sweet & Co.*, and *Lowdham & Co.*, — *Coles*.]

See the case of *Beamon v. Ellice*, Vol. 4 of these Reports, p. 585, and the cases there collected.

COURT OF EXCHEQUER.

Second Sitting in London in Trinity Term, 1831.

BEFORE MR. BARON VAUGHAN.

—
 FISHER v. FILMER.

June 7th.

An attorney brought an action against the petitioning creditor, under a

commission of bankrupt, for business done previous to the assignment:—*Held*, that, notwithstanding the 14th sect. of the bankrupt act, (6 Geo. 4, c. 16), he might maintain the action without proof that his charges had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer.

ASSUMPSIT on an attorney's bill. The defendant was the petitioning creditor in a commission of bankrupt, and

the charges were for business done previous to the assignment.

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Cooper, for the defendant, submitted that the plaintiff must be nonsuited, because it did not appear that the bill had been taxed by the commissioners, as required by the 14th section of the bankrupt act (a).

Andrews, Serjt., for the plaintiff, referred to *Crowther v. Davis*, MS., as having already decided the point.

Cooper.—In that case the bill was for costs incurred after the assignment. There has not been any decision upon this point, which relates to costs incurred previous to the assignment. By the bankrupt act, at a specific time the amount is to be ascertained. And it is the duty of an attorney to get his bill for costs previous to the assignment allowed by the commissioners; and, unless he has done so, he is not in a situation to maintain an action upon it.

(a) The 14th sect. of the 6 Geo. 4, c. 16, enacts, "That the petitioning creditor or creditors shall, at his or their own costs, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain such costs, and by writing under their hands direct the assignees (who are hereby thereto required) to reimburse such petitioning creditor or creditors such costs out of the first money that shall be got in under the commission; and all bills of fees or disbursements of any solicitor or attorney employed under any commission for business done after the choice of assignees,

shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the Court in which such business shall have been transacted, and the same, so settled, shall be paid by the assignees to such solicitor or attorney: provided that any creditor who shall have proved to the amount of 20*l.* or upwards, if he be dissatisfied with such settlement by the commissioners, may have any such costs and bills settled by a Master in Chancery, who shall receive for such settlement, and the certificate thereof, 20*s.* and no more."

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VAUGHAN, B.—May not all this be matter of inquiry before the officer? It strikes me, that when a retainer and cause of action are proved, then the rest is matter of investigation on taxation. It is in effect calling upon me to tax the bill. Cannot the attorney recover for the retainer and the other part of the suit?

Cooper.—I apprehend that an attorney cannot bring an action for his bill during the progress of a suit.

VAUGHAN, B., after some further consideration, at first intimated an intention of reserving the point for the consideration of the Court; but afterwards, on the request of *Andrews*, Serjt., said that he would not do so.

The Jury, therefore, under his Lordship's direction, found a verdict for the plaintiff, for the full amount of the bill. His Lordship telling them that, in his opinion, it must go to be taxed by the proper officer.

Andrews, Serjt., and *Talfourd*, for the plaintiff.

Cooper, for the defendant.

[Attornies—*Fisher*, and *Sutton*.]

June 7th.

SMITH and Another v. BROWN.

When two persons are in partnership as attornies, it is sufficient, under the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, if their bill for business

done is signed in the name of the firm, without the Christian name of either partner.

ASSUMPSIT on an attorney's bill. At the time when the business was done, the two plaintiffs were in partnership as attornies; but, the partnership was at an end at the time when the bill was delivered. One of the plain-

tiffs signed it in the name of the firm, *vis.* "Smith & Jago."

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J. Williams, for the defendant, objected that this was not evidence of the delivery of a signed bill, as required by the statutes 3 Jac. 1, c. 7, s. 1, and 2 Geo. 2, c. 23, s. 23, inasmuch as, without the Christian name, the signature of neither partner could be said to be complete.

VAUGHAN, B.—I think there is so much in the objection, that I will reserve the point. It appears to me that the object of the statute was, that the client should know the name of the attorney. And when mention is made of the name of a party, I think it must mean the Christian and surname.

Verdict for the plaintiff.

Talfourd and *Swan*, for the plaintiff.

J. Williams and *Wightman*, for the defendant.

[Attornies—*E. Smith*, and *W. Murray*.]

IN the course of the Term, a rule *nisi* was obtained on the part of the defendant; which, after argument, was discharged, the Court being of opinion that the signing was sufficient. *Vide* Crompt. & Jervis, Vol. 1, p. 542.

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Sitting in London, after Trinity Term, 1831.

BEFORE LORD LYNDHURST, C. B.

June 15th.

DIXON v. ROBINSON.

A bond was conditioned for the payment, on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5*l.* per cent.:—

Held, that a stamp covering the amount of the principal was sufficient.

DEBT on a bond.—Plea, *non est factum*. The bond was conditioned for the payment on a certain specified day, being at the end of a year from the date, of the sum of one thousand pounds, with interest thereon, at the rate of five *per cent.* It was stamped with a 5*l.* stamp, being the proper stamp, according to the stamp act (a), for a bond “given as a security for the payment of any definitive, and certain sum of money, exceeding 500*l.* and not exceeding 1000*l.*”

For the defendant it was argued, that the stamp was not sufficient, as the sum for the payment of which the bond was in fact given as a security, was the sum of 1,050*l.*, being 1,000*l.* the principal, and 50*l.* for the year's interest. The word in the statute was “payment” not “repayment;” therefore, it could not have reference to any sum advanced as a loan. The fair test by which to try the question was, to consider how much the obligor was entitled to receive, and the obligee bound to pay by virtue of the bond, and to treat that sum which the instrument *did* actually secure as the sum which it was *given* to secure.

Lord LYNDHURST, C. B., directed a verdict to be taken for the plaintiff, and said he would reserve the point for the opinion of the Court; but, upon being informed that the plaintiff was entitled to judgment of the preceding

(a) 55 Geo. 3, c. 184, Schedule, Part 1.

term, and it being suggested on the part of the plaintiff that some case had been decided on the question, his Lordship said, that it should stand over till the next morning; and if the plaintiff's counsel should then produce a case, shewing that the stamp was sufficient if it covered the principal sum, without the interest, then he would direct judgment of the preceding term; otherwise he would adhere to his former resolution of reserving the point.

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On the following morning, *Wightman*, for the plaintiff, cited the case of *Pruessing v. Ing* (a), and relied upon the words of Lord *Tenterden* in that case as very strong upon the question of the sufficiency of the stamp.

Payne, for the defendant, *contra*, contended that the words of Lord *Tenterden* amounted to no more than an *obiter dictum*, and also as the decision was given at once upon motion, it was liable to all the objections (if indeed any such were tenable,) sometimes urged against decisions given "in the hurry of *Nisi Prius*." He also referred to the cases of *Israel v. Benjamin* (b), and *Dickson v. Cass* (c).

(a) 4 B. & A. 204. That was not the case of a bond, but of a bill of exchange. However, Lord *Tenterden*, the only Judge who gave an opinion, and for aught that appears by the report, the only one at the time in Court, said that it had been the constant practice under similar provisions applicable to bonds to measure the stamp duty by the principal sum secured.

(b) 3 Camp. 40. That was the case of a bill of exchange, drawn for "50*l.* sterling, with all legal interest for the same." The bill had a 2*s.* stamp, which, under the stamp act then in force, covered the amount of 50*l.* only. *Garrow*, for the defendant, contended that the

stamp was insufficient, as the bill was to carry interest *from the date of it*, and, therefore, a larger sum was payable upon it than 50*l.* The defendant had paid money into Court, and Lord *Ellenborough* decided that he was thereby precluded from taking the objection. His Lordship was also *inclined to think* that the stamp was sufficient. *Garrow* afterwards moved the Court on the same ground. The Judges did not decide that the stamp was sufficient; but were clearly of opinion that the objection could not be taken after the payment of money into Court.

(c) 1 B. & Ad. 343. A bond was given in a penalty of 2000*l.*,

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Lord LYNDBURST, C. B., expressed his opinion that the stamp must be measured by the amount of the principal sum; and, therefore, directed that the plaintiff should have judgment of the term.

Wightman, for the plaintiff.

Payne, for the defendant.

[Attornies—*Wrigglesworth & R.*, and *Ashurst*.]

conditioned for the payment of all such sums as the obligees (bankers) should advance to the obligors on account of the accepting or paying any bills, &c. to the amount of 1000*l.*, together with such *lawful charges and allowances as were usually charged by*

bankers in such cases, and interest— Held, that a 5*l.* stamp (the proper stamp for a bond given to secure a sum exceeding 500*l.*, but not exceeding 1000*l.*,) was *insufficient* for this bond, which was to secure the bankers' charges as well as the 1000*l.*

Adjourned Sittings in London after Trinity Term, 1831.

June 22nd.

FIRMIN v. CRUCIFIX and STAFF.

The statements in a special plea, on which judgment has been given for the plaintiff on demurrer, cannot be used at the trial of the cause as an admission on the record by the defendant; but the case must be tried on the general issue, without any reference to the special plea at all.

ASSUMPSIT on a bill of exchange, accepted by the defendant Staff in the name of Lardners & Co. The question in the cause was, whether or not the defendant Crucifix was in partnership with Staff, carrying on business under the firm of Lardners & Company. The pleas were *non assumpsit*, and a special plea, which stated that the said supposed bill of exchange was *accepted by the said defendants* in respect of mustard, which the plaintiff warranted to them, and which turned out to be bad. This plea was demurred to by the plaintiff, as not raising a material issue; and judgment by default was given for him.

Thesiger, for the plaintiff, relied on the statements in that plea as an admission upon the record, shewing the connection between the two defendants.

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—
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Hutchinson, for the defendant Crucifix, contended, that the case must be tried upon the general issue, without any reference to the special plea.

LORD LYNDBURST, C. B.—That plea is out of the question. It is for the Jury to decide upon the general issue.

The case then proceeded; but the Jury were not satisfied that Crucifix was a partner; and, therefore, the verdict was

For the defendants.

Thesiger, for the plaintiff.

Hutchinson, for the defendant Crucifix.

[Attornies—*Best*, and *Davies*.]

MEREDITH v. FLAXMAN.

June 24th.

TRESPASS for breaking and entering the plaintiff's room, and taking his goods, and assaulting and beating his wife.

The defendant pleaded not guilty, and also justified the entry and assault, on the ground that a warrant had issued from the Lord Mayor's Court of London to take the goods of a person named Salt, which were in the room in question, and he entered for the purpose of taking them; and while he was endeavouring to get at them, the plaintiff's wife obstructed him.

If a man employing an officer attends with the officer, who seizes in his presence the goods of a third person under an execution which he has sued out, he makes himself responsible for the officer's acts. And, *semble*, that in such a case, where he is present and interferes, he ought to point out to

the officer what goods are to be taken, and what not; also, if in such a case an unjustifiable assault be committed by the officer, the party authorizing the seizure will not be answerable for it, unless it be shewn in some way to have been committed by his direction.

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The defendant in this action had been plaintiff in an action in the Mayor's Court, and had obtained a verdict and judgment against a Mr. Salt, a surgeon, the upper part of whose house the plaintiff and his family had occupied for about two years. The greatest part of the goods taken had been at one time the property of Salt. And the main question of fact in the cause was, whether there had been any transfer of them by Salt to the plaintiff. But it appeared that there were a table and two pictures, which were the property of the plaintiff, having been brought by him from his former lodgings. It did not appear that the defendant himself was *in the room* at all, and the assault upon the wife was committed by one of the officers, who went in under the warrant. The defendant, however, was proved to be near at hand during the seizure, and in communication with the officers; and a witness stated that he heard him say to the broker, "I'll be damned but I'll have them;" but he could not say of what they were speaking.

On the part of the defendant it was contended, that, for the assault, he was clearly not liable to answer.

On the part of the plaintiff it was said, that, as he authorized the seizure, he was answerable for any violence which took place in the execution of it.

Lord LYNTHURST, C. B.—You must shew, in some way, that the violence offered to Mrs. Meredith was done by the direction of the defendant.

No further evidence was given; and no further notice was taken of this point in the course of the cause. Salt swore that he transferred the goods to the plaintiff for a sum of 37*l.* 10*s.*

On the part of the defendant, evidence was given to shew that it was highly improbable that any such transfer had *bond fide* taken place.

Lord LYNDHURST, C. B., (in addressing the Jury) said—supposing you should think that no money was paid, and consequently that there was no transfer of the goods which belonged to Salt, yet there is another point which may affect the verdict. There was a part of the goods taken, viz. a table and two pictures, which were confessedly the property of Mr. Meredith. If a man employing an officer chooses to attend with the officer, who seizes, in his presence, the goods of a third person, under the execution he has sued out, he makes himself responsible for the officer's act; but, if he is not there, and does not personally interfere in the matter, he is not liable. The questions, therefore, for your consideration will be, whether the goods said to have been transferred were the property of Meredith or of Salt; and, if of Salt, then whether these particular articles, viz. the two pictures and the table, were the property of Meredith, and were taken among the rest by the authority of Flaxman; for, if they were, then he is liable. It will be for you to say, whether he was so acting as to identify himself with the particular goods taken. As it seems to me, he ought to have pointed out to the officers what was to be taken, and what not. He was there in communication with the officers, and it appears to me, that by this he has made himself responsible for their acts. The question will be, whether these goods with the rest were taken by the direct authority of Flaxman; for, if they were, then he will be liable; if not, then these goods must share the same fate as the rest. If you think he left it entirely to the officer and the broker to act according to their discretion, then he will not be responsible.

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v.
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The Jury found for the plaintiff, damages 40*s.*
for the table and picture, saying they thought
the officers were acting under the directions
of the defendant.

Adolphus, Price, and Humfrey, for the plaintiff.

Thesiger and Erle, for the defendant.

[Attornies—*Becke*, and *Willoughby*.]

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June 24th.

FAREBROTHER and Another v. WORSLEY and Others, Executors and Executrix of JOSHUA HURST, deceased.

If a Sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequent suit between other parties, involving the same question, was obtained.

Semble, that, if in such an action, after he has obtained a rule nisi for a new trial, he compromises the suit, with the assent of some of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred—he may recover his own costs against the surety who did not assent, if it appears that the compromise was, under the circumstances, reasonable.

Semble, also, that in such a case the words “costs of any *application to the Court touching or concerning* any matter, wherein the bailiff should *act or assume to act* as bailiff,” will comprise the costs of an application to the Court to set aside the judgment on which the execution was founded, the return to which gave rise to the action against the Sheriff.

COVENANT. The substance of the declaration, as it regarded the points in the cause which are here reported, was, that the deceased, Joshua Hurst, covenanted with the plaintiffs, as Sheriff of Middlesex, as a surety with others of their bailiff, Joshua Hurst the younger; one part of which covenant was, “that the said bailiff should and would well and truly pay to the said Sheriff, his under-sheriff, or deputies, or one of them, the costs and charges of defending any action, and of prosecuting or opposing any motion in or *application to the Court, touching or concerning* any matter, *wherein* the said bailiff should *act or assume to act* as bailiff to the said Sheriff.” It then stated certain motions which the plaintiffs were obliged to make, and a certain action in the Exchequer which they were obliged to defend, in consequence of a return to a writ made by the bailiff’s direction.

The defendants pleaded, that the plaintiffs were not damnified; and also, as to the costs of defending the action in the Exchequer, that they were incurred by the plaintiffs unnecessarily (a).

The plaintiffs replied, taking issue on the plea of *non damnificatus*, and alleging, that the costs in the action in the Exchequer were necessarily incurred. Various sums were sought to be recovered, which, as they had been paid by the Sheriff in respect of matters for which, according to the deed, the bailiff gave directions in writing, it is not necessary to introduce here. But it appeared,

(a) There was another plea, which was held bad on demurrer after argument, *vide* 1 Crompt & Jervis, 549.

that, in the month of May, 1827, a judgment was obtained by Mr. Wilton against Mr. Chambers, for 16,000*l.*, in consequence of which a writ of execution, indorsed to levy 1800*l.*, was delivered to Hurst the bailiff, who, under Wilton's direction, levied to a considerable amount on goods at Enfield, as the goods of Chambers. Immediately after the levy, notice was given to the bailiff, by the assignees under a commission of bankrupt which had been issued against Chambers, that the goods belonged to them and not to Chambers. The Sheriff returned *nulla bona*—upon which Wilton commenced an action in the Exchequer for a false return. The Sheriff applied to the Court of King's Bench to set aside the judgment in *Wilton v. Chambers*, and obtained a rule *nisi*, which was not made absolute. The costs amounted to 8*l.* Upon proof of this being tendered—

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Erskine objected, that it was not evidence against the defendants, as it would have relation to circumstances precedent to the time at which the bailiff began to act, and there was no evidence that he had authorized the application.

LORD LYNDEHURST, C. B.—What has the Sheriff to do with the judgment in *Wilton v. Chambers*?

Jervis.—There would have been an end of the matter altogether, if the application had succeeded. It was made under the advice of counsel; the object was to defeat the action of *Wilton v. Farebrother*.

LORD LYNDEHURST, C. B.—I will take the evidence; we shall see how it connects itself with the case afterwards.

It appeared also, that the cause of *Wilton v. Farebrother* was tried, and a special verdict found, and a rule *nisi* for a new trial obtained; this was afterwards abandoned by

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consent, and the cause was compromised, by an agreement on the part of the Sheriff to pay 200*l.* damages, and 400*l.* costs. This was less than the actual amount of the costs. The agreement was made with the assent of the other sureties, but not with the assent of the defendants, the executors. It appeared, however, that they did not require the Sheriff to proceed, but only said they would have nothing to do with it. The *Sheriff's* costs in this action were sought to be recovered, but not any part of the sum paid for the compromise. It was also sought to recover a sum of 80*l.* 14*s.*, being the costs of an application by the Sheriff to postpone the trial of *Wilton v. Farebrother*, till a cause of *Bernasconi v. Farebrother*, involving the bankruptcy of Chambers, which had been tried once in the Court of King's Bench, should have been tried again.

Erskine for the defendants.—It is for the Jury to say, under the direction of his Lordship, whether the Sheriff can recover any part of the costs of the cause of *Wilton v. Farebrother*, as it was compromised without the consent of the executors. It is admitted, that they were not parties to the compromise, therefore, they cannot be fairly implicated in any of the consequences arising from it. As the Sheriff thought proper to enter into a compromise with some of the sureties, to those sureties he must look, and not to those who refused to be parties to any such agreement. The costs, also, of putting off *Wilton v. Farebrother* were spontaneously incurred, and cannot be recovered.

Lord LYNTHURST, C. B.—I have no doubt about these costs, my only doubt is as to any costs which are the result of a compromise.

Jervis, for the plaintiffs.—The question is, did the executors protest against the compromise, did they insist on

the Sheriff's going on and defending? It was necessary that the action should be defended, and it was defended up to a certain time, and the Sheriff exercised a sound discretion in compromising it.

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Erskine.—The Sheriff should not have come to such a compromise, unless he could shew that, if he had gone on, he must have been defeated. In *Wilton v. Farebrother*, the bankruptcy was to be made out by the Sheriff, and he did not prove the trading satisfactorily. That has since, in another case, been established; and if the Sheriff had gone on, he would eventually have succeeded, and received his costs from Wilton.

Lord LYNTHURST, C. B.—There is no question for the Jury. There is no evidence at present before the Court, whether the Sheriff exercised a sound discretion in what he did. He has compromised a defended cause.

Jervis.—It appears that Wilton's costs exceeded in amount the sum paid for them on the compromise.

Lord LYNTHURST, C. B.—There is no knowing, if a new trial had been obtained, and a verdict had passed for the Sheriff, what arrangement the Court would have made with respect to the costs. It does not follow that the Court would have granted a new trial on payment of costs. It is *possible*, that, if the cause had gone on, Wilton would have had to pay the costs.

Erskine.—If the costs were incurred in consequence of the Sheriff's neglecting to put in evidence which was in his power, who ought to bear them? Surely the Sheriff, whose conduct occasioned them, and not the bailiff, who had nothing to do with the matter.

Lord LYNTHURST, C. B.—I should say, not at all; they conduct the defence, and do it as well as they can; they are defending for the bailiff.

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Erskine.—Then, with respect to the 81*l*., the costs of the application to set aside the judgment?—

Lord LYNDHURST, C. B.—I think, as to the 81*l*., that it was an extremely reasonable act, to apply to the Court to get rid of the judgment.

Erskine and Manning.—It is not within the covenant. The words are, “all costs of any motion in, or application to, the Court touching or concerning any matter, wherein the said bailiff shall act or assume to act.”

Lord LYNDHURST, C. B.—I think that covers such a transaction. I think the words, “touching or concerning,” bring it within the covenant; but you shall not be concluded by my opinion here.

Verdict for the plaintiffs, for the amount in the particulars of demand, with leave to move to reduce the damages by the two sums objected to: *viz.* the Sheriff's costs of the compromised action, and those of the motion to set aside the original judgment; the whole bill of costs to be subject to taxation.

Jervis and Burchell, for the plaintiffs.

Erskine and Manning, for the defendants.

[Attornies—*Smith & Son*, and *Arrowsmith*.]

Manning, (*Erskine* having been promoted to the office of Chief Judge of the New Court of Bankruptcy), obtained a rule, pursuant to the leave given at the trial, which, after argument, was

Discharged.

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BEFORE MR. JUSTICE LITTLEDALE, MR. BARON
VAUGHAN, AND MR. JUSTICE BOSANQUET.

REX v. GEORGE SMITH.

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May 16th.

INDICTMENT on the stat. 55 Geo. 3, c. 184, s. 7. The *first* count of the indictment stated that the prisoner, on the 16th day of April, 1 Will. 4, feloniously and fraudulently did cut, tear, and get off from a certain piece of parchment, a certain impression of a die, provided, made, and used in pursuance of an act passed, 55 Geo. 3, intituled "An Act &c." for denoting a certain duty, to wit, of 25*l.*, with intent fraudulently to use it upon another piece of parchment. In the *third* count, the intent laid was an intent to use the impression on "another piece of parchment chargeable with duty." The *fifth* count stated it to be the impression of a die which had been thentofore made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of the duties under the

It was the duty of the prisoner, who was a clerk in the Stamp Office, to cut off the corners of parchments which bore the blue paper stamps allowed for as spoilt, by the commissioners of stamps, and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separat-

ed a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment, on which the words "This indenture" had been written. The Jury found, that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture:—*Held*, that this was a capital offence. And it being uncertain whether the stamp so separated was impressed before or after the passing of the stat. 55 Geo. 3, c. 184, it was held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of those under the management of the commissioners of stamps."

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care and management of the commissioners of stamps of Great Britain." The *second*, *fourth*, and *sixth* counts laid an intent to use the stamp on vellum instead of parchment.

It appeared, that the prisoner was a junior clerk in the office for the allowance of spoiled stamps; and that, on the 9th of April, he was attending at that office, and it was his duty to cut off the corners of parchments, &c., on which the stamps allowed for as spoilt were, and to put the stamp, and the small piece of parchment to which it was glued, into the fire. It was proved that parchments are stamped by glueing a square piece of blue paper to the parchment, and stamping it with a heavy stamper. It was also proved, that one of the witnesses had procured for the prisoner two skins of parchment, on each of which the words "This indenture," were written; and that afterwards he desired the same witness to sell those two skins of parchment, each of the skins then bearing a 25*l.* stamp affixed to it on blue paper; each of those blue paper stamps having been separated from the piece of parchment to which it had originally been glued. It appeared that 25*l.* stamps were used before the 55 Geo. 3; but by the stat. 55 Geo. 3, c. 184, the commissioners of stamps have a power of ordering that dies before used, may be used after that act. To shew this to be a stamp used under that statute, the order-book of the commissioners of stamps was produced. In this book was contained an order of the commissioners of stamps, directing this die to be continued in use. This order was signed by the secretary who was dead, but his handwriting was proved. None of the witnesses could say whether the two blue paper stamps, which were the subject of the present indictment, had been impressed before or after the passing of the stat. 55 Geo. 3, c. 184.

Adolphus, for the prisoner.—There are in this case two objections; the stat. 55 Geo. 3, c. 184, s. 7, makes it a felony

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to fraudulently “cut, tear, or get off, or cause or procure to be cut, torn, or got off the impression of any stamp or die which shall have been provided, made, or used in pursuance of this or any former act, for expressing or denoting any duty or duties under the care and management of the commissioners of stamps, or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment, or paper, or any instrument or writing charged or chargeable with any of the duties hereby granted.” Now, supposing, for the sake of argument, that these 25*l*. stamps are the stamps cut off by the prisoner, at the office for the allowance of spoilt stamps, still he did not fraudulently cut them off, because it was his duty; and the bad intention of converting them might have occurred after they were cut off. The offence contemplated by the act, was the fraudulently cutting off stamps from one parchment and affixing them to another. The other objection is this, that the first four counts state that these were the impressions of a die made and used in pursuance of the stat. 55 Geo. 3, c. 184; now, the witnesses cannot say whether these very impressions did not exist before that time. It is said, that the *fifth* and *sixth* counts merely state the die to have been used under the statute in such case made and provided. Now, we have no proof of its use under any previous statute.

Manning, on the same side.—This was not a case in the contemplation of the Legislature. The words relate to a case of fraudulently cutting off the stamp from one deed and putting it on another, and not to cases where the person does it in the discharge of his duty; and if such a case as this had been meant, there would have been a provision for the carrying away and dealing with stamps properly cut off in the first instance.


C. Phillips, on the same side.—The first objection is

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perhaps rather a question for the Jury, as it will be for them to consider, whether the prisoner had any bad intention at the time he cut off the stamps, or whether he did it in the discharge of his duty. The second objection does not appear to be met by the commissioners' order; and the prosecutors are bound to prove distinctly that these pieces of blue paper did not exist till after the passing of some statute "in such case made and provided." This section of the act of Parliament, 55 Geo. 3, requires, as I submit, that the stamps should be transferred to some vellum or parchment chargeable with duty. Now, if these parchments had been complete indentures, they would have been such; but the blank parchments are not liable to duty; and it is no fraud on the revenue, unless the stamp was transferred to some complete instrument.

Denman, A. G., for the prosecution.—As to the objection that these impressions may have been in existence before the 55 Geo. 3, I would say, that these stamps either existed before that act or they did not. If they did, they were the impressions of stamps used under the act of Parliament then in existence. With respect to the objection, that the stamps were not affixed to complete instruments, I submit that the words "vellum, parchment, and paper," are three descriptions, distinct from that of "instrument chargeable with duty." It is said, that putting the stamps upon blank parchment was no fraud on the revenue. I admit that it was not immediate, but it would be a fraud as soon as the indenture was filled up. It is also objected, that the prisoner had no bad intent when he cut off the corner of the skin of parchment on which it originally was; but it appears, that he afterwards got off the blue paper stamp from the small piece of parchment on which it was glued, which was no part of his duty, as he ought to have burnt the whole together; and this I submit clearly shews what his intention was.

Gurney.—Whether the prisoner, when he cut off the corner of the skin of parchment at the Stamp Office, had any bad intent, is immaterial, because he must have had it when he separated the blue paper from the bit of parchment to which it was glued. With respect to the last objection, it is not necessary that the stamp should be actually transferred to any instrument: it must be cut or taken off with intent to use, and we produce the parchment to which it was transferred, to shew the intent. With respect to the other objection, that the impression was not made from a die used under the stat. 55 Geo. 3, chap. 184, if the other side get rid of the first four counts, they bring themselves within the 5th and 6th counts.

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R. Scarlett cited the case of *Rex v. Holland Palmer* (a), and contended, that the words “vellum, parchment, or paper, or any instrument chargeable,” must be taken in the disjunctive.

Adolphus in reply.—It is essential that the party shall feloniously cut off the stamp. Now, I submit, that here he did not fraudulently cut it off, as he did it in the discharge of his duty. The *Attorney-General* puts the case upon a very nice point, for he contends, that the separating the blue paper from the bit of parchment to which it is glued constitutes the offence. But I submit, that, if the party had not a guilty intent at the time of the original removing of the stamp, it is not a capital felony; and, with respect to the other point, I submit that there is no evidence that the die from which this stamp was struck was

(a) 2 East's P. C. 893, That was an indictment on the stat. 23 Geo. 3, c. 49, s. 20, which makes it a felony to expose to sale “any paper liable to a stamp duty, with any counterfeit impression thereon, knowing,” &c. The prisoner sold

blank papers with forged receipt stamps on them. The Judges held, that the prisoner was rightly convicted, and that pieces of paper destined and prepared for receipts must be taken to be paper liable to stamp duty.

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used by the commissioners of stamps at the time when this impression was taken.

Mr. Justice BOSANQUET.—It does not appear to me that any of the points are sufficient to induce the Court to withdraw the case from the consideration of the Jury. The first objection is, that this act of Parliament applies only to cases where the party wrongfully cuts off the stamp from some instrument. However, that is got rid of by the observation of one of the learned counsel, that it is a question for the Jury, whether the prisoner cut off this stamp for any unlawful purpose; but there is another view of the case in which I am disposed to concur; which is this: admitting that the prisoner originally cut off the corner of the skin of parchment which bore the stamp, without any bad intent, still, if he separated the blue paper stamp from the small piece of parchment, having *then* a fraudulent intent, I think his offence would be within the act of Parliament. The offence in the act is the cutting a stamp from *any* parchment with intent to transfer it to any other parchment, &c. It has been contended, that the words “charged or chargeable” apply to the words “vellum, parchment,” &c. It is true, that in this case there was no complete instrument written on the parchment to which these stamps were transferred. But still the question is, whether the same construction ought not to apply as in *Palmer’s* case: and it also appears, that each of these skins have the words “This Indenture” written upon them. If the impression was fraudulently detached from one parchment, in order to be annexed to some other parchment intended to be used as an indenture, the offence is complete. The only other objection is, that it is not shewn that this was an impression of a stamp used under the stat. 55 Geo. 3, c. 184. Now, if these impressions were made before the 55th Geo. 3, they cannot be taken as impressions from a die under that act of Parliament. If they were

made after that period, I think that the earlier counts are sustained; but, if they were made before, the latter counts of the indictment apply.

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Mr. Justice LITLEDALE.—There are several questions to be left to the Jury, and there are important points which may be considered hereafter.

The prisoner was called on for his defence.

Mr. Justice BOSANQUET (in summing up).—In this case several questions arise. The first question is, whether these are the impressions of a die used under the authority of the commissioners of stamps; for, if so, they must have been used under the stat. 55 Geo. 3, c. 184, or some former act of Parliament. You must also find whether these impressions were made before the 55th Geo. 3; because, if they were, the Judges will consider the case upon the latter counts only. The next question is, whether the prisoner took off these impressions with a fraudulent intent, to annex them to some other piece of parchment; and whether he intended to annex them to some piece of parchment, which, when used, would be liable to the payment of duty? You will also consider, whether he intended to misapply them at the time he cut them from the corners of the skins at the Stamp Office, where he was acting in discharge of his duty. If you think that he fraudulently removed the stamp from a parchment, with intent to place it on some other parchment, I think you ought to find him guilty. But I wish you also to give me your opinion—1st, whether these impressions were made before or since the year 1815; 2nd, whether, at the time he cut off the stamp in the discharge of his duty, he intended to apply it to some other piece of parchment; 3rd, whether, at the time he detached the blue paper from the small piece of parchment to which it was glued, he intended to apply it to any other parchment; and 4th, whether he intended to apply the stamp to

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a parchment to be used as an indenture, which would be liable to stamp duty when complete.

The Jury found the prisoner guilty.

In answer to the questions of the learned Judge, they said—1st. That they had no means of knowing whether the impressions were made before or since the 55th Geo. 3.

2nd. That they acquitted the prisoner of fraudulent intent at the time he cut the stamps from the skins at the stamp office.

3rd. That they found him guilty of fraudulent intent at the time he separated the blue paper from the small piece of parchment to which it was glued.

4th. That they found him guilty of intending to apply the stamp to a parchment which was intended to be used as an indenture.

Mr. Justice BOSANQUET directed a verdict of guilty to be entered on the 5th and 6th counts, and reserved the case for the opinion of the Judges.

Denman, A. G., Gurney, Alley, and R. Scarlett, for the prosecution.

Adolphus, Manning, and C. Phillips, for the defence.

[Attornies—*Timms*, and *Harmer*.]

THIS case was afterwards considered by the Fifteen Judges, who held the conviction right.

By the stat. 55 Geo. 3, c. 184, s. 7, it is enacted—"That if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any stamp or die, or any part of any stamp or die, which shall have been provided, made, or used, in pursuance of this

act, or in pursuance of any former act or acts relating to any stamp duty or duties, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression or any part of the impression of any such stamp or die as aforesaid,

upon any vellum, parchment, or paper, or shall stamp or mark, or cause or procure to be stamped or marked, any vellum, parchment, or paper, with any such forged or counterfeited stamp or die, or part of any stamp or die as aforesaid, with intent to defraud his Majesty, his heirs or successors, of any of the duties hereby granted, or any part thereof; or if any person shall utter or sell, or expose to sale, any vellum, parchment, or paper, having thereupon the impression of any such forged or counterfeited stamp or die, or part of any stamp or die, or any such forged, counterfeited, or resembled impression, or part of impression, as aforesaid, knowing the same respectively to be forged, counterfeited, or resembled; or if any person shall privately and secretly use any stamp or die which shall have been so provided, made, or used, as aforesaid, with intent to defraud his Majesty, his heirs, or successors, of any of the said duties, or any part thereof; or if any person shall fraudulently cut, tear, or get off, or cause or procure to be cut, torn, or got off, the impression of any stamp or die which shall have been provided, made, or used, in pursuance of this or any former act, for expressing or denoting any duty or duties under the care and management of the commissioners of stamps, or any part of such duty or duties, from any vellum, parchment, or paper whatsoever, with intent to use the same for or upon any other vellum, parchment, or paper, or any instrument or writing charged or chargeable with any of the duties hereby granted; then and in every such case every per-

son so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

And by the stat. 12 Geo. 3, c. 48, s. 1, it is enacted, "That if any person or persons, at any time after the 1st day of August, 1772, shall write or engross, or cause to be written or engrossed, either the whole, or any part of any writ, mandate, bond, affidavit, or other writing, matter, or thing whatsoever, in respect whereof any duty is or shall be payable by any act or acts made, or to be made, in that behalf, on the whole or any part of any piece of vellum, parchment, or paper, whereon there shall have been before written any other writ, bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped, according to the said acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing, written in such writ, mandate, affidavit, bond, or other writing, matter, or thing, as aforesaid; or fraudulently cut, tear, or get off, any mark or stamp, in respect whereof, or whereby, any duties are or shall be payable, or denoted to be paid or payable as aforesaid, from any piece of vellum, parchment, paper, playing cards, outside paper of any parcel

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or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter, or thing, in respect whereof any such duty is or shall be payable, or denoted to be paid or payable as aforesaid; then, so often, and in every such case, every person so offending in any of the particulars before mentioned, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons to commit any such offence or offences, as aforesaid, shall be deemed and construed to be guilty of felony; and, being thereof convicted by due course of law, shall be transported to some of his Ma-

jesty's plantations beyond the seas, for a term not exceeding seven years, according to the laws in force for the transportation of felons: and if any such person or persons so convicted or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he, she, or they shall be so transported as aforesaid, such person or persons, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he, she, or they shall be apprehended."

BEFORE THE HON. CHARLES EWAN LAW, COMMON
SERJEANT.

Dec. 11th.

REX v. CULLEN.

A forged paper was in the following form—
"Per bearer two 11—4 superfine counterpanes. T. Davis, E. Twell."
 It was not addressed to any person:—*Held* by the 15 Judges, that it was neither an order nor a request within the stat. 1 Will. 4, c. 66, s. 10, (the forgery consolidation act).

THE prisoner was indicted for that he, on &c., at &c., feloniously did utter, dispose of, and put off to one John Smith, a certain forged *request* for the delivery of goods, which is as follows:—*"Per bearer, two 11—4 superfine counterpanes. T. Davis, E. Twell,"* with intent to defraud John Lainson and others, he the said Charles Cullen well knowing the said request to be forged. The indictment also contained a count, calling the instrument a forged *order*.

The prisoner having been found guilty on this and on other charges of the same description, which, by the 1 Will. 4, c. 66, s. 10 (a), the act upon which the indictment was framed, rendered him liable to be transported for life.

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P. V. Lee, for the prisoner, objected, in arrest of judgment, that the instrument set out in the indictment was neither an "order" nor "request," within the terms of the act of Parliament. *First*, it was not an order, because it was not directed to any person; and to be so, it ought not only to purport to be signed by some person who might command the delivery of the goods; but it ought also *to be directed to a person who was compellable to obey it*. And he cited *Rex v. Clinch* (b), *Rex v. Williams* (c), *Rex v. Mitchell* (d). *Secondly*, it was not a request, for a request was the act of asking something *from another*, which, in this case, was not done, for although the act of presenting the paper, in effect, might be so, yet in *words* it was not; and he, therefore, submitted it fell within the principle of the above decisions.

The prosecutor stated, that such orders were common in the trade.

(a) By which it is enacted,
 "That if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court-roll or copy of any court-roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the de-

livery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years or less than two years."

(b) 2 East, P. C. 938.

(c) 1 Leach, 114.

(d) Fost. 119.

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The COMMON SERJEANT thought, upon the authority of the cases cited, that it was not an order; but he had some doubts whether it was not a request; and, as the point was new, and of some importance to commercial men, he said he would submit it to the Fifteen Judges; which he did, and they were of opinion that the conviction was improper, as the instrument was neither an order nor request within the 1 Will. 4, c. 60, s. 10.

The prisoner was discharged.

OLD BAILEY JULY SESSION, 1831.

BEFORE MR. JUSTICE GASBLEE AND MR. JUSTICE
J. PARKE.

July 2nd.

REX v. BACKLER.

On an indictment for forging a check, purporting to be drawn by G. A. upon Messrs. J. L. & Co. proof that no person named G. A. keeps an account with or has any right to draw on Messrs. J. L. & Co., is *prima facie* evidence that G. A. is a fictitious person.

FORGERY. The *first* count of the indictment charged the prisoner with forging a check, with intent to defraud Thomas Blackwell and another. There was a *second* count for uttering with the like intent; and two similar counts, charging the forgery and uttering to be with intent to defraud Samuel Jones Loyd and others.

The check was as follows:—

“No. 24. No. 23, Lothbury, London, May 24, 1831.
Messrs. Jones Loyd & Company,

Pay to — Newman, Esq. or bearer, ten pounds.

£10 0 0

G. Andrewes.”

It appeared that the prisoner went to Mr. Blackwell, and asked change for the check for Mr. Newman of Soho Square, in whose service he stated himself to have been for three months. The prisoner also said, that Mr. New-

man had put his name on the check. Mr. Newman was not called as a witness; but it was proved, that the name on the check was not of his hand-writing, and that the prisoner had never been in his service. It was also proved, by a clerk of Messrs. Jones Loyd & Co., that No. 43, Lothbury, was their banking house, and that no person of the initial and name G. Andrewes kept any account there, or had any right to draw checks on their house.

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Mr. Justice J. PARKE (in summing up).—You must be satisfied not only that the prisoner uttered this check, but also that it is a forgery, and that he knew it to be so. Now, we find that he stated that he was a servant of Mr. Newman, and that Mr. Newman had put his name on the back of the check: but it is shewn, not only that the name is not of Mr. Newman's hand-writing, but that the prisoner never was in his service. There is no proof as to who this G. Andrewes is, and the question therefore is, whether there is evidence sufficient to satisfy you that Andrewes is a fictitious person. That being a negative, it is not easy to prove, and the evidence from which you are asked to infer it, is that this check is drawn upon Jones Loyd & Co., no person of that initial and name having any right to draw on them. My learned brother and myself, after conferring, think that this is sufficient *prima facie* evidence that he is a fictitious person; and if there was any such real person either keeping cash at this banking house or not, the prisoner might have produced him or have given some evidence on the subject. If it had turned out that a person named Andrewes had drawn upon Jones Loyd & Co., without funds, that would have been a fraud and not a forgery; but, we think, in point of law, that there is sufficient evidence of Andrewes being a fictitious person, more especially as the prisoner does not produce any evidence, nor even make any statement as to who Andrewes is.

Verdict—Guilty, on the second count.

See the case of *Rex v. King*, *post*, p. 123.

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A. was fighting with his brother; and to prevent this B. laid hold of A., and held him down upon a locker on board the barge in which they were, but struck no blow. A. stabbed B.:—
Held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only.

REX v. BOURNE.

INDICTMENT on the stat. 9 Geo. 4, c. 31, ss. 11, 12, for stabbing and wounding James Lightfoot, with intent to murder him. There were two other counts, laying the intent to be to disable him, and to do him some grievous bodily harm.

The prosecutor stated that the prisoner and his brother, who was a boy about six years younger than himself, were fighting on board the barge Alfred, which was lying in the West India Docks, and in which he (the prosecutor) also worked; that he laid hold of the prisoner to prevent him from beating his brother, and held him down on a locker, but did not strike him; and that the prisoner stabbed him with a knife just above the knee.

The prisoner in his defence said, that the prosecutor had knocked him down.

Mr. Justice J. PARKE (in summing up).—The prosecutor states that he was merely restraining the prisoner from beating his brother, which was quite proper on his part; and he says, that he did not strike any blow. If you are of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck any blows, then I think that it would. You will, therefore, consider whether any thing was done by the prosecutor more than was necessary, or whether he gave any blows before he was cut.

Verdict—Guilty, on the third count.

1831.

REX v. PEARSON.

July 3rd.

SEE *ante*, Vol. 4, p. 572. In this case the fifteen Judges decided that the 11th and 12th counts of the indictment were bad, as they did not conclude *contra formam statuti*.

An indictment for stealing a bank note did not conclude *contra formam statuti*:—*Held*,

by the fifteen Judges, that it was bad.

OLD BAILEY JANUARY SESSION, 1832.

BEFORE MR. JUSTICE PARK, MR. JUSTICE J. PARKE,
AND MR. BARON BOLLAND.

1832.

REX v. BRIDGET CULKIN.

Jan. 7th.

MURDER. The indictment charged that the prisoner in and upon one Margaret Duffy “did make an assault, and that the said Bridget Culkin, with both her hands about the neck of the said Margaret Duffy, the said neck and throat of the said Margaret Duffy then and there feloniously, wilfully, and of her malice aforethought, did grasp, squeeze, and press, and by the grasping, squeezing, and pressing aforesaid,” did suffocate and strangle the deceased.

A. was charged with suffocating B. by placing both her hands about the neck of B.—*Held*, that A. might be convicted on this indictment if B. was suffocated in any manner, either by A. or by any other person in her presence, she being privy to the commission of the offence.

It appeared that Margaret Duffy, a child of about six years of age, had been suffocated for the purpose as was supposed of being dissected. The surgeon said, that her death had been caused by the pressure of a hand on the back of the neck, another hand being held over the mouth. There was evidence tending to shew that a man and woman had committed the offence; and there was much circumstantial evidence tending to shew the guilt of the prisoner.

The phrase “about the neck,” in an indictment for murder, is good, and is not open to the same objection as “about the breast.”

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 v.
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Clarkson, for the prisoner, objected that the mode of the death was improperly stated in the indictment, as it was not stated that the hand over the mouth was the cause of the death.

Mr. Justice PARK.—It is the same kind of death.

Mr. Justice J. PARKE.—If the death was proved to be by suffocation at all it would be sufficient.

Clarkson.—The indictment states the pressure to have been *about* the neck. In stating a wound, it is laid down by Lord *Hale* (a), that about the breast, *circiter pectus*, would not be sufficient.

Mr. Justice J. PARKE.—About the breast might mean only near the breast, but about the neck means round it.

The prisoner was called on for her defence.

Mr. Justice J. PARKE (in summing up).—If you are satisfied that this child came by her death by suffocation or strangulation, it is not necessary that the prisoner should have done it with her own hands; for, if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist, she may be properly convicted on this indictment.

Verdict—Not guilty.

Adolphus and *Heaton*, for the prosecution.

Clarkson, for the prisoner.

[Attorney for the prosecution—*T. T. Taylor*.]

(a) In 2 H. P. C. 185, it is laid down, that an indictment for murder, stating the wound to be *super brachium*, or *manum*, or *latus*, without saying whether right or left, is not good; nor is *circiter pectus*, nor *super partes posteriores corporis*; but *super faciem* or *caput*, or *super dextram partem corporis*, or *in infima parte ventris*, are certain enough. See the case of *Rex v. Tye*, Carr. Supp. 35.

1832.

REX v. KING.

Jan. 9th.

THE first count of the indictment charged the prisoner with having forged a bill of exchange, drawn by one Thomas Webb, accepted by one Samuel Knight, and indorsed by the said Thomas Webb, with intent to defraud a person named Beit.

In the other counts of the indictment the prisoner was charged respectively with uttering the bill, knowing it to be forged; with forging the acceptance; with uttering the bill, knowing the acceptance to be forged; with forging the indorsement, and with uttering the bill knowing the indorsement to be forged.

From the evidence of Mr. Beit, the prosecutor, who was a dealer in German silver, it appeared that the prisoner applied to him about the beginning of the month of June, saying that he wished to purchase some German silver, that his name was King, of King-square, which was chiefly his property, and derived its name from him; that he was out of business himself, but was requested to make the purchase by some friends in the country. He left at that time without taking any of the metal; but came again on the 9th, and brought with him a person whom he described as a manufacturing man. The metal was to be paid for in cash, and the prisoner took from his pocket the bill of exchange in question, and said it had a little time to run, and he could not very well get it discounted, and therefore he would leave it with the prosecutor till the Monday following. He did not come again at all. The bill purported to be accepted by "Samuel Knight, Market-place, Birmingham." The second indorsement on the bill was proved to be in the prisoner's handwriting. The prosecutor stated that he went twice to Birmingham to inquire after Knight, and, on the second occasion, inquired at the bank there, and at a place where the overseers of the poor met. He also stated that he had made

Where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham"—It was held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the Jury, though neither the best nor the usual evidence given to prove the non-existence of a party whose name is used.

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inquiries at Nottingham, at which place the bill purported to be drawn, for Thomas Webb, the drawer, but was not able to hear any thing of him. On his cross-examination, he admitted that he was a stranger to both these places, and that he had not procured any person from either place to prove that such persons as Knight and Webb were not known at them. On his re-examination he stated, that he had made inquiries in King-square, but could not hear of any such person as the prisoner there.

Carrington, for the prisoner, submitted that the evidence of the prosecutor did not satisfactorily shew that the signatures, "Samuel Knight" and "Thomas Webb," were not those of real persons. He referred to the case of a prosecution at the instance of the King's College, in London, where, to prove that a certain name was fictitious, the twopenny postman, and also a police-officer of the district in which the person was described as residing, were called as witnesses; and he contended, that, in the present case, witnesses should have been called, who were well acquainted with Birmingham and Nottingham respectively.

Mr. Justice J. PARKE (after conferring with the other Judges present) said—I have consulted with my learned brothers, and they are of opinion with me that it is evidence to go to the Jury. It is not, certainly, the most satisfactory evidence; nor is it the evidence that is usually given in such cases: but it is evidence. It will be for the Jury to say whether it is sufficient.

The prisoner, in his defence, said that he took the bill from Thomas Webb, the drawer, and gave him value for it.

Two witnesses were called on his behalf, who stated that they knew Thomas Webb, and that the drawing and indorsement were of his handwriting. They described

him as having lived at one time at Nottingham, and at another in Weymouth-terrace, Hackney-road.

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v.
King.

The prosecutor said, that the person who came with the prisoner was described as living in Weymouth-terrace, but his name was said to be Smith. No such person, however, could be found on inquiry there.

Mr. Justice J. PARKE (in summing up) said—The first question for your consideration will be, whether you are satisfied that the acceptance in the name of Samuel Knight is in the name of a person not in existence. There is some evidence of this. The prosecutor says, he was twice at Birmingham, and on the second occasion inquired at the bank, and at a place where the overseers met. Certainly this is not the most satisfactory evidence. A banker from Birmingham, or an overseer, might have been called. On the other hand, the prisoner, who best knows the state of the matter, has not called any body to prove that there is such a person as Samuel Knight, whose writing it is. If he had done this, it would have been satisfactory. It will be for you to say, whether the inquiries made by Beit are sufficient, in the absence of any evidence on the part of the prisoner. If you think they are, then you will find him guilty, otherwise not. With respect to the indorsement of Webb, the prisoner has produced evidence. It may be a fraudulent transaction altogether; yet, if the signatures are those of persons actually in existence, though the bill may be false and fraudulent, still it cannot be said to be forged.

Verdict—Not guilty.

Carrington, for the prisoner.

The prisoner was also indicted for stealing the metal; but it appearing from the prosecutor's statement that he parted with the property in the article, an acquittal was taken; but he was afterwards

ordered to be detained in custody on a charge of conspiracy, for which a true bill had been found. See the case of *Rex v. Backler*, ante, p. 118.

1832.

Jan. 10th.

REX v. HUGHES and ANN WORSLEY.

If an indictment for shooting another, with intent to murder, &c., in all the counts aver that the pistol was loaded with powder *and a leaden bullet*, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal.

THE indictment charged the prisoner Hughes with shooting at the prisoner Worsley with intent to murder her, and the prisoner Worsley with being present aiding and assisting him (a). Another count charged the intent to be, to do her some grievous bodily harm. There were other counts in the indictment, but all of them stated the shooting to be with a pistol, loaded with gunpowder *and a leaden bullet*.

From the evidence on the part of the prosecution, it appeared that the prisoner Worsley was housekeeper to a person, named Bentley, who had an organ, which the prisoner Hughes was in the habit of coming to play; that on Saturday, the 22nd of October, he came about tea-time, and Bentley left him in company with the prisoner Worsley, at ten o'clock at night, when he retired to rest. About eleven, he was awakened from sleep by the report of fire-arms, accompanied by the sound of a fall upon the floor overhead in the room in which he left the prisoners. He immediately rose, and went into the housekeeper's room, and discovered both prisoners lying on the floor,

(a) In Hawkins's Pleas of the Crown, title *Felo de se*, Book 1, c. 9, s. 6, it is said, "He who kills another, upon his desire or command, is, in the judgment of the law, as much a murderer, as if he had done it merely of his own head; and the person killed is not looked upon as a *felo do se*, inasmuch as his assent was merely void, as being against the laws of God and man. But where two persons agree to die together, and one of them, at the persuasion of the other, buys ratsbane, and

mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; perhaps, it is the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner."

See also *Rex v. Dyton*, Russ. & Ry., C. C. R. 523; and Carr. Sup. 230.

bleeding. On their being asked, what was the matter, and who fired? the male prisoner said, "I fired one pistol at her, and the other at myself." The woman only said, "Lord, have mercy upon me." They were taken to St. Thomas's Hospital, where the man said—"He could feel the ball somewhere in his cheek." The woman being asked there, whether she wished Hughes to shoot her? replied—That she did; and had removed her cap for the purpose. The surgeon, who attended them, before they were removed to the hospital, said, that both prisoners were bleeding from the ear, the bones of which were shattered, but no bullet could be found on examination, internally and externally, either in the man or the woman. He added, that he thought the wound was either from the ball or the wadding of a pistol; and that the wadding, if rammed down tight, might have produced the effect, without any ball. It was also proved, that search was made in the room, but no ball was found.

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C. Phillips, for the prisoners, submitted that the averment in the indictment, that the pistol was loaded with a bullet, had not been proved, and therefore the case was not sustained. He referred to Archbold's Treatise upon Mr. Peel's Acts, Vol. 2, p. 43, where, in a note to the form of an indictment for shooting, which stated the pistol to be loaded with a leaden bullet, it is said—"The prosecutor must prove the shooting, as stated in the indictment; and either must shew expressly, that the pistol was loaded with gunpowder and a bullet, or prove circumstances, from which the Jury may fairly infer it."

BOLLAND, B., who tried the case, consulted with Mr. Justice *Park*, and Mr. Justice *James Parke*, who were present, and then said to the Jury—The offence is charged, in every count of the indictment, as having been committed with a pistol, loaded with *a leaden bullet*. If the question had arisen with respect to the pistol fired by

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the man at himself, I should have felt it my duty to leave it to you, on his declaration, that he thought he felt a ball in his cheek. But he might have intended to kill himself, being weary of life, though he might not have intended to kill the woman, notwithstanding her request. I have consulted with my learned brothers, and it is our opinion, that the indictment is not sufficiently proved, to justify you in a verdict of guilty (a).

Verdict—Not guilty.

C. Phillips, for the prisoner.

(a) In the case of *Rex v. Kitchen*, Russ. & Ry. C. C. R. 95, cited Carr. Sup. 239, (which decided, that when a pistol was fired so near, and in such a direction as to be likely to kill, &c., and with intent to do so, it was a shooting within the 43 Geo. 3, c. 58, though it was loaded with powder and

paper only), the indictment contained counts—*first*, for shooting with a loaded pistol; *secondly*, for shooting with a pistol loaded with gunpowder only; and *thirdly*, for shooting with a pistol loaded with gunpowder and other destructive materials. See the case of *Rex v. Harris*, post,

Jan. 11th.

REX v. MARTIN.

A. was indicted for the manslaughter of B., by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—*Held*, that if it was occasioned by a blow with a hammer or any other hard substance held in the hand, it was sufficient to support the indictment; but otherwise, if it was the result of a push against the door.

THE prisoner was indicted for the manslaughter of Ann Evans. The indictment charged the wound to have been inflicted by a blow with a hammer, which he held in his hand.

It appeared that the prisoner and the deceased lodged in the same house, and that, on the day in the indictment, (frequent disputes having previously taken place on the

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same subject), a quarrel arose about a staircase window, which the prisoner wished to keep shut, and the deceased wished to have open. The prisoner had twice shut it, and a son of the deceased was about to open it a second time, when abusive words passed between them, which the deceased interfered to put an end to, and a scuffle ensued; in the course of which, it was suggested, that the prisoner, who had a small glazier's hammer in his hand, struck the deceased on the back of the neck with it. The surgeon who attended the deceased said, that there was a bruise on the back of the neck, just over the spine; and that it was such an injury as would be likely to be produced by the blow of a small hammer. It appeared that the deceased was not in a good state of health, and that she was desired to remain in the hospital, where she could be best attended to, but would not.

The prisoner in his defence said, that he did not strike the deceased with a hammer, and did not know how she received the injury, unless it was by striking against the door in the struggle, as it was dark at the time.

The surgeon being called up again said, that, from the appearance of the injury, it *might* have been occasioned by a fall against *the lock* or *the key* of the door, but not against the flat part or the edge; but he repeated, that the appearance was quite consistent with the supposition, that the blow was given by a hammer.

C. Phillips, for the prisoner, submitted, that, with this uncertainty, the indictment could not be sustained.

Mr. Justice J. PARKE.—It will be for the Jury to say, whether the injury was occasioned by a blow of a hammer, or by a knock against the door.

His Lordship afterwards (in summing up) said—The indictment charges that the prisoner, wilfully and feloniously, struck the deceased with a hammer. The kind

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 v.
 MARTIN.

of instrument is immaterial. There is no count which describes the injury to have been occasioned by her being struck against the door in the struggle. If, therefore, you are of opinion, that the injury was occasioned by a fall against the door, produced by the act of the prisoner, it will not do; but if you think that the injury was occasioned by a blow given with a hammer, or *with any other hard substance held in the hand*, then the indictment will be sufficiently proved. It is said, that the deceased was in a bad state of health; but that is perfectly immaterial, as, if the prisoner was so unfortunate as to *accelerate* her death, he must answer for it. You will give me your opinion, whether you think the injury arose from the blow being given with a hammer, or by a fall; and if you think by the latter, I will put the case in a train for further consideration hereafter.

C. Phillips submitted to his Lordship, that if the Jury thought the injury was occasioned by a fall, the prisoner ought to be acquitted. He referred to *Rex v. Kelly (a)*, and *Rex v. Thompson (b)*.

Mr. Justice J. PARKE assented.

And the Jury said, they were of opinion, that the in-

(a) R. & M. C. C. R. 113. That case decides, that "in an indictment for murder or manslaughter, when the cause of death is knocking a person down with the fist, upon a stone or other substance, the charge should be accordingly; and a charge that the prisoner with a stone, &c., which he held in his right hand, gave and struck a mortal blow, will not be sufficient, especially if there be no statement, that the person knocked the deceased down

upon the ground."

(b) R. & M. C. C. R. 139. The difference between this case and *Rex v. Kelly* consisted in the statement of the cause of death in the indictment, which was, that the prisoner assaulted the deceased, and struck and beat him on the head, and thereby, then and there, gave him divers mortal blows and bruises, &c. The facts and the decision were similar. See these cases, Carr. Supp. 75.

jury was occasioned by a blow given with a hammer, and therefore, found the prisoner guilty; but they thought that it was given under great excitement, and therefore recommended him to mercy. They added, that they thought, he had the hammer in his hand, for the purpose of nailing down the window.

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C. Phillips, for the prisoner.

OXFORD SUMMER CIRCUIT.

1831.

BEFORE MR. JUSTICE PARK AND MR. JUSTICE PATTESON.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

1831.

July 11th.

DOR on the Demise of PACKER and Others *v.* HILLIARD and Others.

Practice—In cases of ejectment, the certificate of the Judge must, under the stat. 11 Geo. 4, c. 70, s. 38, be for *immediate* possession, or the case must take its ordinary course; but if the Judge should think that some time ought to be allowed to the defendant, he will grant a certificate for *immediate* possession, the lessor of the plaintiff undertaking not to enforce it for a certain time.

EJECTMENT to recover eight houses at Thatcham.

The lessor of the plaintiff was the assignee of an annuity charged on these houses, which was in arrear.

There was a verdict for the plaintiff.

Talfourd, for the lessors of the plaintiff, applied for a certificate, under the stat. 11 Geo. 4, c. 70, s. 38 (a), to entitle the lessors of the plaintiff to immediate possession.

Mr. Justice PARK.—Under this act of Parliament, I must either give you a certificate for *immediate* possession, or you must wait till Michaelmas Term. The act of Parliament gives me no discretion as to time: however, I will

(a) Set forth *ante*, Vol. 4, p. 589, n. (a); and see the case of *Doc dem. Williamson v. Dawson*, *Ib.*

grant the certificate, if the lessors of the plaintiff will undertake not to put his writ of possession in force, if the arrears of the annuity are paid within a month.

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Talfourd, for the lessors of the plaintiff, consented to this undertaking, which was entered by the associate on the back of the *Nisi Prius* record.

Talfourd and *Carrington*, for the plaintiff.

Russell, Serjt., for the defendant.

[Attornies—*M. Hodding*, and *Holmes & E.*]

BEFORE MR. JUSTICE PATTESON.

REX v. CRUTCHLEY.

July 11th.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 4 (a), for destroying a threshing machine, the property of a person, named Austin. There were other counts for damaging it with intent to destroy it, and for damaging it with intent to render it useless.

It appeared, that, at about ten o'clock in the night of the 22nd of November, 1830, a mob came to the farm of Mr. Austin, and broke his threshing machine to pieces. It was proved, that the prisoner was with this mob, and that he gave the threshing machine a blow with a sledge hammer.

Mr. Justice PATTESON allowed the witnesses for the prosecution to be asked, in cross-examination, whether many persons had not been compelled to join this mob against

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 4, for breaking a threshing machine, the Judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob, the first opportunity.

they did not agree together to run away from the mob, the first opportunity.

(a) Set forth *ante*, Vol. 4, p. 449, n.

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their will, and whether the mob did not compel each person to give one blow to each threshing machine that they broke.

For the defence, William Davis was called. He was the gamekeeper of Mrs. Bainbridge, in whose service the prisoner was as an under-keeper. He stated, that, being on the watch, at Mrs. Bainbridge's preserves, the mob laid hold of himself and the prisoner, and compelled both to go with them, for the purpose of breaking threshing machines.

Mr. Justice PATTERSON allowed this witness to state, that before the prisoner and himself had gone many yards with the mob, they agreed to run away from the mob the first opportunity.

The witness stated, that he ran away from the mob in about ten minutes, and that the prisoner joined him in about a quarter of an hour after that time, and that they then returned to their watching at the preserves.

Verdict—Not guilty (a).

(a) In general, what a party says is not evidence in his favour, unless it be part of a conversation, of which some other part has been already given in evidence by the opposite party. However, where a declaration of a party accompanies an act, and is a part of the transaction, it becomes admissible. Thus, the declarations of a bankrupt when he leaves his house are constantly received, to shew the motive of his going; so, what a person says *immediately* on receiving a hurt, may be given in evidence. And in the case of *Aveson v. Kinnaird*, 6 East, 193, *Ld. Ellenborough* said, that, in an action for crim. con., he would receive evi-

dence, that the wife had said at the time she left her husband's house, that she did so from the immediate terror of personal violence from him.

The declarations and conduct of a party to explain his acts are often extremely material in cases of mutiny on board ships, as it frequently happens, that when the mutineers have deposed their captain, they find that none of them are able to navigate the ship, and they then force one of the officers to assume the command of her; and he is, in many cases, brought to trial, because he appeared to have been acting with and directing the mutineers.

Tyrwhit, for the prosecution.

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Carrington, for the defence.

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v.

[Attornies—*Blandy & Andrews*, and *Burtlett*.]

CRUTCHLEY.

BEFORE MR. JUSTICE PARK.

REX v. WEALE.

July 15th.

THE prisoner was indicted upon the stat. 7 & 8 Geo. 4, c. 29, s. 26 (a), for having feloniously killed and carried away a deer kept in an uninclosed part of the forest of Wychwood, in the county of Oxford, he having previously been convicted by a Justice of the Peace for an offence relating to deer, for which a pecuniary penalty is, by that act, imposed, namely, the offence of having used a gun in the same county, for the purpose of killing deer in the said forest; within sect. 28 of the same statute (b).

On an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 26, for killing a deer after a previous summary conviction, a conviction by two Justices of the previous offence was put in:—*Held*, that such a conviction was good. This conviction, in stating the offence, did not state the place at which it was committed; but the Justices, in awarding the distribution of the penalty, awarded it to the overseers of D., in the said county, "where the said offence was committed:"—*Held*, sufficient.

On the part of the prosecution, a conviction of the prisoner for the previous offence was proved, and offered in evidence. The conviction was by *two* Justices of the Peace. After stating the venue in the margin in the usual form, it set forth, that on a certain day (naming it), in the year 1830, at a certain place (naming it), in the county of Oxford, the prisoner was convicted before us, A. B. and C. D., *two* of his Majesty's Justices of the Peace for the said county, for that he (the prisoner) did, on a certain day (naming it), unlawfully and wilfully use an engine, called a gun, for the purpose of killing deer in the forest of Wychwood, but omitted to state where or in what county the offence was committed. It then proceeded to inflict a pecuniary penalty upon the prisoner, and directed such pe-

(a) Set forth Carr. Supp. 305. (b) Set forth Id. 363.

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nalty to be paid to the overseers of the poor of the parish of D., in the said county, "*where* the said offence was committed."

Busby, for the prisoner.—I submit that this conviction cannot be received in evidence, on two grounds: *first*, because the offence charged therein was cognizable only by *one* justice of the peace, whereas the conviction was by *two*; and, *secondly*, because it is not stated that the prisoner had used the gun in the county of Oxford. Upon the first objection I submit that in every case where a justice of the peace exercises a statutable jurisdiction, the provisions of the statute touching the particular matter must be strictly pursued. Now, by s. 28 of this statute, upon which the conviction was founded, jurisdiction is given to "a justice of the peace," not to a justice or justices of the peace; but the conviction in question was by two justices of the peace, and, therefore, did not pursue the provisions of the statute. The conviction must be taken to have been made by the justices jointly or severally; if jointly, it is not within the act; if severally, the Court cannot say by which of the justices it was made in preference to the other; and also, in that view of the question, the prisoner appears to have been convicted twice, *i. e.* once by each justice. Whether joint or several, the conviction is bad. With respect to the second objection, I submit that the want of a venue in stating the offence is a fatal defect. The offence charged was the using a gun for the purpose of killing deer; the using the gun, therefore, for the purpose mentioned, and not the killing of the deer, was the real offence, and the offence might have been committed in one county, and the deer have been killed in another. It was, therefore, necessary that the conviction should state expressly that the prisoner had used the gun in the county of Oxford, which it has omitted to do; consequently it does not appear that the convicting justices had any jurisdiction. The venue in the margin does not aid the defect, because that only aids informal allegations, and not matters of substance; and the state-

ment in the adjudicating part, that the forfeiture was to be paid to the overseers of the poor of the parish of D. in the county of Oxford, “*where* the said offence was committed,” is equally unavailing, on the ground that a substantial defect in a conviction, as the want of a venue in the description of the offence, cannot be helped by reference to a subsequent part of the conviction, or by intendment or argument. And, besides this, in the form of conviction set out in s. 71 of the statute (*a*), a direction is given to specify the place where the offence was committed.

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 REX
 v.
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Mr. Justice PARK overruled the first objection, holding that a conviction by two justices was good; but called upon *Abbot*, who appeared for the prosecution, to answer the second objection.

Abbot contended that it sufficiently appeared, upon the face of the conviction, that the offence was committed in the county of Oxford, which gave the justices jurisdiction; for that, assuming that the venue in the margin did not aid the alleged defect, the statement in the adjudicating part, that the forfeiture was to be paid to the overseers of the poor of the parish of D. in the said county, “*where* the said offence was committed,” was a sufficient allegation that the prisoner had used the gun within the county of Oxford, and supplied the omission in the description of the offence.

Mr. Justice PARK expressed himself of this opinion, and received the conviction in evidence.

Verdict—Guilty (*b*).

Abbot, for the prosecution.

Busby, for the prisoner.

(*a*) Set forth Carr. Supp. 359. one of the learned counsel engaged in it.
 (*b*) For the report of this case we are indebted to the kindness of

1831.

WORCESTER CITY ASSIZES.

BEFORE MR. JUSTICE PARK.

July 20th.

REX v. WALTERS.

A bankrupt is not indictable on the stat. 6 Geo. 4, c. 16, s. 112, for concealing his books till after he has concluded his last examination.

Parol evidence of any thing that a bankrupt says at the time of his last examination, cannot be received, although it should appear that no part of what he said was taken down in writing.

Whether, on such an indictment, the petitioning creditor is a competent witness to prove the petitioning creditor's debt—*Quære.*

INDICTMENT on the stat. 6 Geo. 4, c. 16, s. 112 (a), for concealing two account books. The *first* count of the indictment stated, that, on the 17th of November, 1 Will. 4, the prisoner was a trader and shoemaker at Worcester, and that he was indebted to Peter Fish in a sum exceeding 100*l.*, to wit, 131*l.* 10*s.*; and that he became a bankrupt within, &c. It then stated the petition and the commission at length; and that the commissioners, before they acted, took the oaths; and that the prisoner was duly declared a bankrupt. It then stated, that notice of the commission and adjudication was personally served on the bankrupt, he then being in prison; and that notice was given in the Gazette, and three public meetings held; and that after the commission and adjudication, and after these notices, the prisoner did feloniously &c. conceal divers, to wit, two books of account, to wit, a ledger and cash-book, with intent then and there to defraud his creditors. The *second* count stated that the prisoner was a trader, and was indebted to Peter Fish in a sum exceeding 100*l.*, and had become bankrupt, and that a commission of bankrupt had duly issued under the great seal, directed to certain commissioners therein named, by whom the prisoner was duly declared bankrupt, of which he had notice. It then charged that he feloniously removed the two books. There were two similar counts for removing the books.

(a) Set forth in Carr. Supp. 171; and see the cases there referred to.

Curwood, for the prosecution, opened, that after the prisoner had been declared a bankrupt, it became his duty to deliver up all his books; but that, instead of doing so, he denied the existence of two of them, a ledger and a cash-book, which were afterwards found buried at the house of a person named Allen, who was a relation of the prisoner.

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The commission of bankrupt was put in and read. In the setting it out in the first count of the indictment, the word 'securities' was inserted instead of the word 'fees.'

C. Phillips, for the prisoner, objected that this was a fatal variance.

Mr. Justice PARK.—Without considering whether it be such a variance as is fatal or not, I shall not stop the case, as the second count appears to me to be quite sufficient (a).

(a) The second count was in the following form:—And the Jurors aforesaid, upon their oath aforesaid, do further present, that, heretofore, to wit, on the 17th day of November, in the first year of the reign aforesaid, at the city of Worcester aforesaid, and county of the same city, the said John Walters was a trader, to wit, a shoemaker, then and there seeking his living by buying and selling, and was then and there justly and truly indebted to the said Peter Fish in a certain sum of money, amounting to 100*l.* and upwards, to wit, the sum of 131*l.* 10*s.*, and that the said John Walters, being such trader, seeking his living as aforesaid, and being indebted as aforesaid, then and there became and was a bankrupt within the true intent and meaning of the statute then and

now in force concerning bankrupts. And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said John Walters, so being bankrupt as last aforesaid, and the said last-mentioned debt, so due and owing from him to the said Peter Fish as aforesaid, being and remaining wholly unpaid and unsatisfied, afterwards, to wit, on the 13th day of December, in the first year of the reign aforesaid, a certain commission of our said lord the King, sealed with the Great Seal of Great Britain, founded upon the said statute, and bearing date at Westminster, in the county of Middlesex, a certain day and year therein mentioned, to wit, the day and year last aforesaid, was duly awarded and issued out by the then Lord High Chancellor of Great Britain, directed to certain per

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I do not think it is essential in a case of this kind to state the commission and proceedings with so great particularity.

To prove the petitioning creditor's debt, the petitioning creditor was called.

Mr. Justice PARK suggested a doubt whether he was a competent witness; and, having conferred with Mr. Justice *Patteson*, said, that he would receive the evidence, subject to further consideration.

The petitioning creditor was, however, not called, and the petitioning creditor's debt was proved by other evidence.

The proceedings under the commission were put in, and by them it appeared that the final examination of the

sons therein named, whereby our said lord the King then and there appointed the said last-mentioned persons, four or three of them, his said Majesty's commissioners, to proceed according to the said statute, amongst other things, touching and concerning the said bankruptcy of the said J. Walters, and also touching and concerning his estate and effects; and that afterwards, to wit, on the 20th day of December, in the first year of the reign aforesaid, at the city aforesaid, and county of the same city, the major part of the said last-mentioned commissioners did duly proceed to the execution of the said last-mentioned commission, and did then and there duly declare and adjudge that the said John Walters had become, and then and there was such bankrupt as last aforesaid. Whereof the said J. Walters afterwards, to wit, on the day and year last aforesaid, at

the city aforesaid, and county of the same city, had notice. And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said J. Walters, after he so became bankrupt as last aforesaid, to wit, on the 13th day of December, in the first year of the reign aforesaid, with force and arms, &c., at the city of Worcester aforesaid, and county of the same city, wilfully, maliciously, fraudulently, and feloniously, did remove divers, to wit, two books of account, to wit, a certain book called a cash-book, and a certain other book called a day-book, then and there respectively relating to his estate, with intent then and there to defraud his the said J. Walters's creditors under the said last-mentioned commission, against the form of the statute in such case made and provided, and against the peace of our said lord the King, his crown and dignity.

bankrupt had never been completed, and that it was adjourned *sine die*. The paper, purporting to be the final examination, did not contain any questions or answers; it merely stated that the commissioners, not being satisfied with the answers of the bankrupt, adjourned the examination *sine die*.

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Busby, for the prosecution, proposed to give parol evidence of what the bankrupt had said before the commissioners.

Mr. Justice PARK.—I think it cannot be done.

Busby.—As it is shewn that what the bankrupt said was not taken down, I submit that I may give parol evidence of what the bankrupt said; and besides, by the 36th sect. of the bankrupt act (a), the commissioners are empowered to examine by parol.

(a) By which it is enacted, "That it shall be lawful for the commissioners, by writing under their hands, to summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time by them appointed (having no lawful impediment made known to them at such time, and allowed by them), it shall be lawful for the said commissioners, by warrant under their hands and seals, to authorize and direct any person or persons they shall think fit, to apprehend and arrest such bankrupt, and bring him before them; and upon the appearance of such bankrupt, or if such bankrupt be present at any meeting of the said commissioners, it shall be lawful for them to examine such bankrupt upon oath, either by word of mouth, or on in-

terrogatories in writing, touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing; which examination, so reduced into writing, the said bankrupt shall sign and subscribe; and if such bankrupt shall refuse to be sworn, or shall refuse to answer any questions put to him by the said commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the said commissioners any such questions, or shall refuse to sign and subscribe his examination so reduced into writing as aforesaid (not having any lawful objection allowed by the said commissioners), it shall be lawful for the

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C. Phillips and Carrington, contra, relied on those words of the 86th section of the bankrupt act, which require the examination to be reduced into writing.

Mr. Justice PARK.—I can receive no evidence of the examination but the writing. The examination is required to be in writing by the act of Parliament; and that part which relates to the examining by parol, applies only to the questions which may be either put by parol or by written interrogatories. But even if the prisoner had concealed these books, I am of opinion that he is not indictable till after he has concluded his last examination; till then he has a *locus penitentiae*. How do we know that when he goes to complete his last examination he will not deliver up all his books correctly? The prisoner must be acquitted.

Verdict—Not guilty.

Curwood and Busby, for the prosecution.

C. Phillips and Carrington, for the prisoner.

[Attornies—*Gilham*, and *Hughes*.]

said commissioners, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to the said commissioners

to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination."

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STAFFORD ASSIZES.

BEFORE MR. JUSTICE PATTESON.

REX v. ANN SAVAGE (a).

July 26th.

THE prisoner was indicted for stealing five shawls, the property of Peter Cotterell. It was proved, that she went to the shop of the prosecutor, with "Mrs. Downing's compliments"—and said, that Mrs. Downing wanted some shawls to look at; the prosecutor selected five shawls, and gave them to the prisoner; who pawned two of them the same evening, and the remainder were found in her lodgings. Mrs. Downing was so near her confinement, as not to be able to attend at the assizes, or before the committing magistrate; and it was proved, that the prisoner was taken to Mrs. Downing by the magistrate; and a witness stated, that what Mrs. Downing said in the presence and hearing of the prisoner was taken down in writing.

Greaves, for the prosecution, proposed to call the magistrate, to prove what was stated by Mrs. Downing in the hearing of the prisoner.

Lee, for the prisoner.—The illness of Mrs. Downing might be a good ground for putting off the trial, but can be no reason for receiving the examination.

Greaves.—If the witness be unable to travel through illness, the depositions are admissible. 1 *Hale*, 586; *Kel.* 55 (b).

(a) For the report of this case we are indebted to the kindness of the learned counsel engaged in it.

(b) See the case of *Doe dem. Evans v. Lloyd*, ante, Vol. 3, p. 219.

If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition of the witness taken before the magistrate.

A. went to the shop of B., and asked for shawls for Mrs. D. to look at; B. gave her five, she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness:—*Held*, that A., on this evidence, could not be convicted of a larceny in stealing the goods of B.

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Mr. Justice PATTESON.—That has been doubted by Mr. *Starkie* (a); and I think the evidence is not admissible.

Lee.—My objection is not, that the deposition is not admissible, although I might contend that point, but that the statement made by Mrs. Downing in the magistrate's presence cannot be received from the magistrate's recollection of what occurred, when the facts had been reduced into writing, which writing is not in Court. And I would submit, that the indictment ought to have been for false pretences, inasmuch as it was by a false representation that the goods were procured; and it is clear, the property was parted with by the prosecutor, when the shawls were delivered to the prisoner, because he has said, he considered the goods as sold to Mrs. Downing. This is like the case of *Rex v. Davenport* (b), for there the delivery, in the first instance, was legal: and we must assume, until Mrs. Downing proves the contrary, that she sent for all the goods.

Greaves, contra.—That case is precisely in point in support of this indictment; the only difference between the cases is, that there the prosecutor sent two articles for the supposed orderer to make his selection; here, the *prisoner* asked for some shawls for Mrs. Downing to look at. And, as in that case the property would continue in the prosecutor till the selection was made, so it would in this case. The true distinction between false pretences and larceny is this: if the property, as well as the possession of the goods, passes from the prosecutor, at the time of the delivery of the goods, to the prisoner, the indictment ought to be for false pretences;

(a) 2 Law of Evid. 487. In practice, motions are frequently made on the part of the prosecutors of criminal cases, to post-

pone the trial, on account of the illness of a material witness.

(b) Arch. Peel's Acts, 4.

but if the possession alone be parted with, the property remaining in the prosecutor, there the indictment ought to be for larceny. Here the property did so remain in the prosecutor, and therefore the indictment is right.

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Mr. Justice PATTESON.—That would be so, if it had been proved that Mrs. Downing had not sent the prisoner for the shawls; but we must assume that Mrs. Downing did send her.

Greaves.—Assuming that the property passed to Mrs. Downing on the delivery to the prisoner, she might have been indicted for stealing the goods of Mrs. Downing. Now, although the property did not pass to Mrs. Downing, yet she was a special bailee; and it is impossible to draw any distinction between the case of a special bailee, and that of an absolute owner of property. Any possession, even that of a mere finder, is sufficient as against a wrong doer; and no distinction can be made between the different degrees of absolute or limited rights of possession.

Mr. Justice PATTESON.—At common law, no indictment could have been maintained for larceny by Mrs. Downing, against the prisoner, if she had been her servant (*a*). It must be assumed, that she received the

(*a*) If the prisoner had been really sent by Mrs. Downing for the shawls, and had converted them to her own use, before they had got to the hands of Mrs. Downing—it seems that the proper indictment would have been for embezzlement. On the subject of embezzlement, the following case has been decided by the twelve Judges.

OLD BAILEY MAY SESSION, 1830.—*Coram* T. DENMAN, Esq.
 COMMON SERJEANT.

—
 REX v. MURRAY.

May 28th.

THE prisoner was indicted for embezzling, amongst other monies, the sum of 1*l.* 0*s.* 6*d.*, under the following circumstances—It appeared that the prisoner was a clerk, employed in the office of Messrs. Ad-

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goods properly, and that it afterwards entered into her mind to convert them to her own use. At that time, in whom was the possession of the goods?

Greaves.—It must be admitted, that it was in the prisoner, although the property was in the prosecutor.

Mr. Justice PATTERSON directed the Jury to acquit, on this defect in the evidence.

Vardict—Not guilty.

lington & Co., Solicitors; and that, upon the 22nd of March, he received the sum of 5*l.* from William Rothwell Jackson, one of their managing clerks, with directions to pay out of it a charge for inserting an advertisement in the London Gazette, for Messrs. Adlington & Co. The prisoner charged in his account the sum of 2*l.* 0*s.* 6*d.*, for such advertisement, when, in truth, he only paid the sum of 1*l.* The prisoner was found guilty.

F. V. Lee, amicus curiæ, suggested, that the money, if received by the prisoner himself from the master, for the purpose of paying it to a third person, would not be an embezzlement within the 7 & 8 Geo. 4, c. 29, s. 47, which contemplated a receipt or taking into possession of monies received by servants from third persons, for and on account of their masters. He cited *Rex v. Peck*, 2 Russ. C. & M. 213; and suggested that the receipt from Jackson was, in fact, a receipt from the master, and that the master's right of property never was divested.

Clarkson, for the prosecution, contended that this was a receipt of monies by the prisoner for and on account of his master, within the act; but, at all events, it was clearly a larceny; and there being a count of that description in the indictment, that was sufficient.

On looking at the larceny count, it was ascertained that the stealing was stated to be "in manner and form aforesaid."

F. V. Lee then suggested, that that count was an imperfect count for an embezzlement, and not a count for larceny; and that "in manner and form aforesaid," was a material averment, and could not be rejected as surplusage; and he contended, that if the first objection was good, the indictment was altogether defective.

The prisoner was found guilty.

The COMMON SERJEANT respited the judgment, to take the opinion of the twelve Judges—who held the objections fatal to the indictment, and ordered the prisoner to be discharged.

Greaves, for the prosecution.

F. V. Lee, for the prisoner.

[Attornies—*Foster*, and *Watson*.]

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v.
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CHARLTON, Esq. v. HILL.

July 17th.

MONEY had and received. . Plea—General issue, with a notice of set off (a). The defendant was clerk of the course at the Lichfield races of 1830; and it appeared that the horse of the plaintiff had “walked over” for the Produce-stakes, whereby the plaintiff was entitled to a sum of 25*l*., which sum was in the hands of the defendant as clerk of the course. On the part of the defendant it was contended, that he had a right to detain this sum of 25*l*., because the plaintiff had called at the office of Mr. Wetherby, (who publishes the Racing Calendar, and is authorized to enter horses), and had desired his name to be entered for the Two-year-old-stake at the same races. The amount of the subscription to that stake was 25*l*.. It was proved, that, before the time of the races, the plaintiff went to Mr. Wetherby, and said, he would withdraw his name from the Two-year-old-stake, because a list of the horses entered had not been sent; but, Mr. Wetherby’s clerk stated in his evidence, that, when a gentleman entered for a stake, they did not allow him to withdraw his name. It was, therefore, contended, that the defendant had a right to detain the sum of 25*l*.. won by the plaintiff from the Produce-stake, to satisfy the 25*l*.. for the plaintiff’s subscription to the Two-year-old-stake.

The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against a stake of another race won by the plaintiff’s horse.

The clerk of the course at a race cannot bring actions for unpaid stakes.

Mr. Justice PATTESON.—There is nothing like a set off

(a) Where there is any chance of the defendant’s proving his set off by the cross-examination of the plaintiff’s witnesses he should plead the set off, and not give notice of it, because, by having to prove his notice of set off, he loses the reply.

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proved. The defendant could not have brought an action against the plaintiff for this Two-year-old-stake. The clerk of the course has no right to the stakes, till he gets the money into his hands; he is never more than a mere stakeholder. Indeed, if he could bring actions for unpaid stakes, he would be liable to have actions brought against him for every stake that was won, whether he had received it or not; and his situation would not be a very enviable one. The plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Campbell and F. V. Lee, for the plaintiff.

C. Phillips, for the defendant.

[Attornies—*Rosser* and S., and *Simpson*.]

STAFFORD ASSIZES. .

BEFORE MR. JUSTICE PARK.

July 26th.

REX v. STOKES.

A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good.

INDICTMENT for rescuing a person named Spilsbury out of the custody of John Tooth, a constable, in whose custody he was by virtue of a warrant of Mr. Fowke, a magistrate.

The magistrate's warrant was put in; it recited that it appeared to the magistrate, by the certificate of the clerk of the peace, that a bill of indictment had been found against Spilsbury for an assault, and commanded the constable to apprehend him.

Greaves, for the defendant.—I submit that this warrant is bad. The magistrate had no right to grant a warrant, except on evidence upon oath. If a bill of indictment was found at the Sessions, the Sessions might have granted

their own process to bring in the offender. The indictment was in that Court, and though that Court might have acted on it, a single magistrate had no right to do so.

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Ferrard, for the prosecution.—I believe that the granting of a warrant in this way is in the ordinary course of business; and besides, as the constable was commanded by the magistrate's warrant to take the party, and it being a case over the subject matter of which the magistrate had jurisdiction, namely an assault, the constable had nothing to do but to execute the warrant.

Mr. Justice PARK.—I have signed warrants over and over again on the certificate of the clerk of assize; and I should expect some authority to be cited to shew me that the practice is illegal. A Judge's warrant is not the warrant of the Court, but of the Judge personally. Where a thing is the act of the Court, the Judge's personal name never appears to it at all. There are some particular affidavits that must be sworn before a Judge, and there the Judge's own name must be signed to them. Even at the Assizes, where I sign warrants continually, I alone am not the Court without the clerk of assize or some other commissioner being joined with me; and if an indictment came in from the Grand Jury now, while I am sitting in Court, I should not grant a warrant upon it without a certificate being first given by the clerk of assize. I will, however, confer with my learned brother on the point, as there is much business of this kind in the Court of King's Bench.

His Lordship, having conferred with Mr. Justice *Patterson*, said—"My learned brother has no doubt; he says it is done every day."

Verdict—Guilty.

Ferrard, for the prosecution.

Greaves, for the defendant.

As to the practice respecting the granting of Judge's warrants on indictments found in the Court of King's Bench, see 1 Gude's Cr. Off. Prac. 85; and the forms of certificates are given *Id.* Vol. 2, p. 175, *et seq.*

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SHREWSBURY ASSIZES.

BEFORE MR. JUSTICE PATTESON.

July 30th.

HUGHES v. MARSHALL and Others.

The treating act
7 & 8 W. 3,
c. 4, only applies
to candidates
and their agents.

ASSUMPSIT for goods sold. Plea—General issue.

This action was brought for the price of ale and other refreshments, supplied to the voters of Mr. Slaney, M.P. for Shrewsbury, during the election there in the year 1830. The defendants were not members of Mr. Slaney's committee; and it was proved, that they had ordered the refreshments in question, and had signed a paper stating that fact and the amount of the account.

The defence was, that the plaintiff had given credit to Mr. Slaney's committee, and that this account had been included in another account, which had been paid by that committee; and

Campbell, for the defendant, also contended, that the plaintiff could not recover, as this account came within the treating act 7 & 8 W. 3, c. 4 (a), since which no bill for treating at an election could be recovered.

Mr. Justice PATTESON.—That act only applies to candidates and their agents. If I was to go and run up a bill during an election, there is no doubt that I must pay it. By this act of Parliament, candidates and their agents are prohibited from treating voters; but still, as many of the voters come from a distance, they must have accommodation and refreshment, and for that they must either themselves be liable, or any one else may be liable who gives the order, provided he be neither a candidate nor an agent.

(a) Cited *ante*, Vol. 3, p. 401, n. See the case of *Ward v. Nanney*, *Id.* p. 399.

His Lordship left the case to the Jury on the first ground of defence.

Verdict for the plaintiff.

Curwood and Watson, for the plaintiff.

Campbell and Godson, for the defendants.

[Attornies—*Yates*, and *Moore*.]

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In the ensuing term *Godson* obtained a rule *nisi* for a new trial, which was subsequently discharged.

(*Crown Side*).

BEFORE MR. JUSTICE PARK.

REX v. HICKMAN.

July 29th.

MANSLAUGHTER. The *first* count of the indictment stated the death of the deceased to have been by blows. The *second* count stated, in substance, that the deceased, John Randell, was riding on horseback, and that the prisoner made an assault upon him, and struck him with a stick; and that the deceased, from a well-grounded apprehension of a further attack upon him, which would have endangered his life, spurred on his horse, whereby it became frightened, and threw the deceased off, giving him a mortal fracture, &c.

There was no evidence to support the first count; and it appeared, that the prisoner and the deceased, being both on horseback, had a quarrel; and that the prisoner struck

An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence

was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed:—*Held*, that this evidence sufficiently supported the indictment.

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the deceased with a small stick, and that he rode away along the Holyhead road, the prisoner riding after him; and that, on the deceased spurring his horse, which was a young one, the horse winced, and threw him.

Bather and *C. Phillips*, for the prisoner, objected—*First*, that the fall ought to have been laid as the cause of the death; whereas, the cause stated was the blow of the stick and the frightening of the horse; and, *secondly*, that the blow and the frightening of the horse were stated jointly to have been the cause of the death, whereas the blow, it was evident, could not have caused it, ever so remotely; and, besides that, it was stated, that the deceased was apprehensive of a further attack upon him, which would endanger his life, of which there was not the slightest evidence.

Mr. Justice PARK.—I think the second count is sufficiently proved. The death of this individual was clearly caused by the frightening of his horse. In indictments for robbery, terror and force are always both stated, but it is sufficient to prove one of them. However, in this count, it is not stated that the deceased died of any blow. In the case of *Rex v. Evans (a)*, it was held, that if the death of the deceased, who was the wife of the prisoner, was partly occasioned by blows, and partly by a fall out of a window, the wife jumping out at the window from a well-grounded apprehension of further violence that would have endangered her life, the prisoner was as much answerable for the consequences of the fall, as if he had thrown her out at the window himself.

Verdict—Guilty.

Whateley, for the prosecution.

Bather and *C. Phillips*, for the defence.

(a) 1 Russ. C. & M. 425. See the case of *Rex v. Culkin*, ante, p. 121.

1831.

GLOUCESTER ASSIZES.

BEFORE MR. JUSTICE PATTESON.

REX v. WARREN JAMES.

Aug. 13th.

INDICTMENT on the riot act, 1 Geo. 1, st. 2, c. 5, s. 1 (a). The indictment stated, that, on the 8th of June, 1 Will. 4, the prisoner and certain evil disposed persons, to the number of one hundred and more, did unlawfully, riotously, and routously assemble; and that, while so assembled, Edward Machin, one of his Majesty's Justices of the Peace for the county of Gloucester, did go, as near as he safely could, to proclaim silence; and afterwards did, as near as he safely could, make proclamation (setting out the proclamation (b)); and that the prisoner, and the other persons, to the number of twelve and more, afterwards, and notwithstanding the proclamation, did remain together for the space of an hour and more, against the form of the statute.

An indictment on the riot act, 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been *in terrorem populi*.

C. Phillips, for the prisoner.—I submit that this indictment is bad. In an indictment for a riot, it is necessary that the indictment should state it to have been *in terrorem populi*. That was decided in the case of *Rex v. Hughes* (c); and it is so laid down by the text writers. This indictment begins with charging a riot, as, without that, the magistrate had no right to make proclamation; and it being necessary to charge that a riot was com-

(a) Set forth *ante*, Vol. 4, p. 442.

(b) Care ought to be taken to set out the proclamation exactly as the Justice made it. Several of the printed precedents, in setting out the proclamation, vary from the proclamation as given

in the act, and as given in Chetw. Burn, Vol. 5, p. 22, and Chit. Burn, Vol. 5, p. 283, from which magistrates are very likely to read it.

(c) *Ante*, Vol. 4, p. 373. See also the case of *Rex v. Cor*, Id. 538.

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mitted, that riot must be charged in the indictment with legal technicality; and not being so here, I submit, that, by reason of the omission of the *terrorem populi*, this indictment cannot be supported.

Mr. Justice PATTESON.—This indictment pursues the words of the act on which it is framed. The charge here is, for keeping together after being riotously assembled. There is a distinction between an indictment for a riot, and an indictment framed on this act. I think the indictment is sufficient.

Verdict—Guilty.

Jervis, Campbell, W. J. Alexander, and Talbot, for the prosecution.

C. Phillips and Phillpotts, for the defence.

[Attornies—*Green, Pemberton, & Co.*, and *Chadborn*.]

Aug. 13th.

REX v. BIRT and Others.

If parties assemble together for a purpose, which, if executed, would make them rioters; but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly.

INDICTMENT for a riot, with a second count for an unlawful assembly. Each count concluded *in terrorem populi*.

It appeared that the prisoners, and a large number of persons, assembled to cut down the fences of the inclosures of the forest of Dean; and that the surveyor-general of the forest, and his woodmen, did not think themselves strong enough to resist them; and that inclosure fences to the extent of a mile and more were destroyed.

Mr. Justice PATTESON.—The difference between a riot and an unlawful assembly is this: If the parties assemble

(a) See the case of *Rex v. Cox*, Vol. 4, p. 538.

in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose, which, if executed, would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly.

Verdict—Guilty.

Jervis, Campbell, W. J. Alexander, and Talbot, for the prosecution.

C. Phillips and Phillpotts, for the defence.

[Attornies—*Green, Pemberton, & Co.*, and *Chadborn*.]

See the case of *Rex v. Cox*, *ante*, Vol. 4, p. 538.

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REX v. SALISBURY.

Aug. 15th.

INDICTMENT for stealing a letter from the post-office, containing bank-notes. The first eight counts of the indictment were framed on sect. 2 of the stat. 52 Geo. 3, c. 143 (a). The *first* count charged, that the prisoner was employed in the post-office at Dursley, in the opening of the mail bag, and sorting of letters; that a letter, directed to Messrs. Joseph Cox & Sons, came by the post, containing certain bank-notes of 10*l.* each, and that the prisoner stole the notes. The next seven counts varied this, by its being stated in some of them, that the notes were in a packet, and in others, that the prisoner secreted the letter; and the property was also laid to be in different persons. The 9th, 10th, 11th, 12th, and 13th counts were framed

S. was employed by a post-mistress to carry letters from Dursley to Berkeley, at a weekly salary paid him by the post-mistress, but which was repaid to her by the post-office:—*Held*, that S. was a person employed by the post-office, within the stat. 52 Geo. 3, c. 143, s. 2.

But a letter sent from Cardiff to Dudley, but which, it

was alleged, was mis-sent to Dursley, if stolen by S., would not be a letter which came to his hands "in consequence of his employment."

Semle—That the words, "whilst employed," in sect. 2 of the stat. 52 Geo. 3, c. 143, relative to stealing letters, merely mean that the party should be then in the employ of the post-office; and not that the letter, when stolen, was in the party's hands in the course of his duty.

On an indictment for felony, a matter, which was the subject of another indictment for felony, was material to be given in evidence; as it formed a part of the facts of the case. The Judge received the evidence, and did not direct the second prosecution to be abandoned.

(a) Set forth *ante*, Vol. 4, p. 572, n. (a).

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on sect. 3 of the act (a). The *ninth* count charged, that the prisoner stole a letter from the post-office at Dursley, containing the bank-notes; and the other counts varied the charge, by laying the property differently, and by stating the letter to be a packet. The last count charged the prisoner with stealing the notes in the dwelling-house of Mrs. Baldwin, the post-mistress of Dursley.

Jervis, for the prosecution, opened.—That the prisoner was a letter-carrier from Dursley to Berkeley, and that his wife was the sister of Mrs. Baldwin, who was the post-mistress of Dursley, where he sometimes opened the mail-bags and sorted the letters. That a letter, sent by Mr. Joseph Cox from Cardiff, and directed to Dudley, containing the notes in question, had been mis-sent to Dursley, from which place the letter and its contents had been stolen. He also stated, that a person named Baller had sent a letter, containing other bank-notes, from Lostwithiel to Uley, which would have to pass through the Dursley post-office; and that the notes sent in Mr. Baller's letter were taken out, and Mr. Cox's notes, to an equal amount, put into Mr. Baller's letter in their stead. He was proceeding to shew how Mr. Baller's notes would be traced to the possession of the prisoner.

Curwood, for the prisoner, objected to this being stated, as there was another indictment against the prisoner for stealing the notes out of Mr. Baller's letter. And he cited the cases of *Rex v. Smith* (b), and *Rex v. Westwood* (c), and a case in which the same point was decided by Mr. Baron *Bolland*.


Mr. Justice PATTESON.—On the part of the prosecution, they put it in this way:—they propose to shew, that the prisoner stole Mr. Cox's notes, because they were put into

(a) Set forth *ante*, Vol. 4, p. 573, n.

(b) *Ante*, Vol. 2, p. 633.

(c) *Ante*, Vol. 4, p. 547.

Mr. Baller's letter in exchange for his notes, which must have been taken out by some one, and are to be traced to the prisoner's possession. In the case of *Rex v. Ellis* (a), it was held, that evidence of other felonies was receivable, where they were all parts of one transaction. I see, that in that case there was only one indictment; but still, I think that the evidence respecting Mr. Baller's notes is essential to the chain of facts necessary to make out the case.

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Curwood.—I hope that your Lordship will direct the other prosecution to be abandoned.

Mr. Justice PATTESON.—I will see about that.

It appeared from the evidence of Mrs. Baldwin, the post-mistress of Dursley, that she employed the prisoner, at a salary of 14s. a-week, to carry the letter-bag from Dursley to Berkeley; and that she was allowed by the Post-office, in her quarterly account, the sums she paid him; but she stated, that the prisoner never sorted the letters, or opened any mail-bag. There was no very distinct evidence to shew that Mr. Cox's letter ever was in the Dursley post-office; but the notes contained in it were distinctly shewn to have been put into Mr. Baller's letter, notes to an equal amount having been taken out; and evidence was adduced, with a view of tracing some of these notes to the prisoner; but the statements of some of the witnesses was by no means positive.

Mr. Justice PATTESON, (in summing up).—I think that the prisoner was a person in the employ of the Post-office, as his sister-in-law paid him 14s. a-week, which the Post-office allowed her again. The evidence is, that he was not employed as a sorter, but as a letter-carrier from

(a) 9 D. & R. 174.

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Dursley to Berkeley. I think also, that this letter cannot be said to have come to his hands "in consequence of his employment;" because he, as a letter-carrier from Dursley to Berkeley, would not have a letter addressed from Cardiff to Dudley come to his hands in the course of his duty. However, the 2nd section of the act of Parliament goes on "whilst so employed." The question, then, is, whether those words relate to time only, or whether they make it essential that the letter should come to his hands in the course of his duty. I am inclined to think that they relate merely to time; because the words "by virtue of his employment" are used in another part of the section. However, this is less material, as there is a count for stealing the letter out of the post-office at Dursley; and also a count for stealing in a dwelling-house, to the value of more than 5*l.*; and if the letter was stolen out of the post-office, the prisoner may be convicted on either of those counts; and if he merely stole the notes, he may be convicted of larceny. If the prisoner took the letter containing these notes from the post-office at Dursley, he will come within one of the capital charges; and, as they are all capital, it will not be very material to determine which.

Verdict—Not guilty(a).

Jervis, Campbell, Ludlow, Serjt., and Maule, for the prosecution.

Curwood and Justice, for the defence.

[Attornies—*Peacock*, and *Blossome & Co.*]

(a) See the case of *Rex v. Pearson*, ante, Vol. 4, p. 572. The prisoner was afterwards tried on the indictment charging him with stealing the notes from Mr. Baller's letter, and acquitted.

1831.

REX v. HARRIS.

Aug. 17th.

INDICTMENT on the statute 9 *Geo.* 4, c. 31, ss. 11, 12(a), charging the prisoner with attempting to discharge a loaded pistol at William Watkins, by drawing the trigger. In the different counts, the intent was laid to be, to murder, disable, do grievous bodily harm, and to resist lawful apprehension.

If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot by possibility be fired, this is not "loaded arms," within the stat. 9 *Geo.* 4, c. 31, ss. 11, 12.

The prosecutor had been appointed a special constable to execute a warrant of Mr. Ducarel, a magistrate, to take the prisoner on a charge of riot. The warrant was both shewn and read to the prisoner, and he drew a pistol, which was loaded to within half an inch of its muzzle, with gunpowder, paper, and two ill-shaped balls. This the prisoner pointed at the head of the prosecutor, within four inches of his ear, and pulled the trigger. The lock went down, and the prosecutor saw a single spark proceed from it. No mischief was done, and the pistol was taken from the prisoner. There was no priming found in the pan, but it was proved that that might have dropped out in the struggle to take the pistol from the prisoner.

The prisoner said, in his defence, that the pistol was kept loaded for the protection of his house, which had been robbed, but that, to prevent his children from doing themselves mischief with it, he always kept a piece of paper in the pan, and another piece of paper twisted tightly, and run into the touch-hole, so as to prevent its being fired.

The prisoner's son was called to prove that the pistol had been in this state the day before.

Mr. Justice PATTESON, (in summing up).—If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, I think that the prisoner ought to be acquitted, because I do not think that a pistol

(a) Set forth Carr. Supp. pp. 236, 237.

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so circumstanced ought to be considered as loaded arms, within the meaning of this act of Parliament.

Verdict—Guilty (a).

Justice, for the prosecution.

Watson, for the defence.

[Attornies—*Lucas*, and *Hulls*.]

(a) See the case of *Rex v. Hughes*, ante, p. 126.

Aug. 17th.

REX v. ROBERT COLLIER, Gent., One &c.

The practice of issuing county court processes in blank, for the attornies to fill up after they have been issued by the county clerk, is highly irregular. And *semble*—that the filling up of a county court summons, or altering a *distringas* into a summons, after it has been so issued in blank, is a forgery at common law.

INDICTMENT for forging a county court summons. The *first* count of the indictment charged the defendant with forging “a certain paper-writing, in the words and figures following;” (it then set out the summons *verbatim*), with intent to defraud John Collier. The *third* count stated the instrument to be “a certain summons, purporting to be a summons sued out from the county court of David Ricardo, Esq., Sheriff of Gloucestershire.” The *fifth* count stated the instrument to be “a certain summons, purporting to be a summons under the seal of the office of David Ricardo, Esq., the said D. R. then being Sheriff of Gloucestershire.” The *second*, *fourth*, and *sixth* counts, were for uttering the summons, knowing it to be forged; and the *seventh* and *eighth* were for obtaining the sum of 7s. 6d. by falsely pretending that the instrument was a genuine summons.

The paper in question was a printed form of a *distringas*, which had had the words respecting the distraining struck through with a pen, and the word “summon” inserted instead. The whole of the filling up of the instrument was in the defendant’s handwriting, and his name was to it, as the attorney who had sued it out. It purported to be a summons at the suit of a person named Allen. There was a seal to it, but whether this was the genuine seal of the county court or not, the witnessés could not state, as the

impression was so defective (a). No entry of the issuing of this summons appeared in the books of the county court. This paper had been served on the prosecutor, and he had paid the defendant the costs, as if it had been a genuine summons, and also the debt which Allen claimed of him. It appeared, from the evidence of the county court clerk, that, when he was absent, the clerks in the office, if they were busy, sometimes gave out blank summonses to the attornies, who filled them up for themselves.

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Mr. Justice PATTESON.—I do not see that there is any evidence of an intent to defraud the prosecutor. He would have had just the same costs to pay if this summons had been sued out in the most regular manner.

Curwood.—In cases of forgery at common law, there need be no intent to defraud any particular person (b).

Mr. Justice PATTESON.—It is highly irregular; but I know that these summonses are sometimes given out in blank. I am not prepared to say, that, after the notice that this trial will give parties as to the impropriety of the practice, I should not hold, that this mode of filling up a summons, or of altering a *distringas* into a summons, was not forgery.

Verdict—Not guilty.

Curwood and *Carrington*, for the prosecution.

Justice and *Busby*, for the defence.

[Attornies—*Ward*, and *Collier*.]

(a) Seals are affixed to many public documents in a very slovenly manner. The Great Seal affixed to a commission of bankrupt, which was given in evidence in a case of felony tried before Mr. Justice *Patteson*, at the Hereford Sum. Ass. 1831, was a mere lump of wax, which had no impression upon it; and the prisoner's coun-

sel objected, that this was not a commission of bankrupt *under the Great Seal*. The prisoner was acquitted on the merits, and this objection was therefore not further considered.

(b) For the law respecting forgery at common law, see 1 *Curw. Hawk*. 263.

HOME SUMMER CIRCUIT.

1831.

BEFORE LORD TENTERDEN, C. J., AND MR. JUSTICE GASELEE.

MAIDSTONE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE GASELEE.

1831.

July 29th.

REX v. BELL.

On the trial of a prisoner who has made before a magistrate a voluntary confession of his guilt, previous to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk; the proper course is, for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper.

THE prisoner was indicted for the murder of Richard Taylor.

It appeared, that, on the 21st May, the prisoner and his younger brother were brought up to be examined before the magistrates at Rochester. They had both been in custody since the 17th, and various depositions had been taken between that day and the 21st. On the 21st, several depositions were taken in the presence of the prisoner, and the younger brother was about to state a confession made to him by the prisoner on the previous evening, when the prisoner interrupted him, and made a full confession of his guilt. This confession, the magistrate's clerk immediately reduced into writing, and it was read over to the prisoner, who put his mark to it. It was attested by the magistrate's clerk thus:—"Taken and *signed* by the said John Heneker Bell, in the presence of——." On the 23rd and two following days, other depositions were taken

in the presence of the prisoner; and, on the 25th, he was fully committed for trial. Some additional depositions were subsequently taken in the absence of the prisoner; some of them as late as the 6th of July. All these latter depositions were duly returned to the Court, including the prisoner's confession, but not the earlier depositions of the 21st of May and previously. It was proposed, on the part of the prosecution, to read the confession in evidence.

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v.
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Clarkson, for the prisoner, objected to its admissibility, on the following grounds—*First*, that it was made by the prisoner before the evidence against him had been gone through. On this point he referred to *Rex v. Fagg (a)*, in which *Garrow*, B., expressed his opinion, that nothing which a prisoner stated before he knew what the evidence against him was, ought to be used to criminate him. *Secondly*, that some of the depositions were taken in the absence of the prisoner. *Thirdly*, that there were interlineations and erasures. And, *fourthly*, that there was a false attestation.

GASELEE, J., after consulting Lord *Tenterden*, C. J., upon the objections, said—My Lord *Tenterden* agrees with me that the opinion of Mr. Baron *Garrow* in *Rex v. Fagg* is much too general, as it would go to exclude any acknowledgment of guilt made by a prisoner to a constable. He also agrees with me, that the interlineations and erasures are cured by the attestation, which cannot be called a false attestation, though it would have been more regular to have said, that the prisoner put his mark, as is customary in affidavits in the superior Courts. We are both of opinion, that it is no objection that some of the depositions were taken in the absence of the prisoner. We are also both of opinion, that the confession may be repeated by the ma-

(a) Vol. 4 of these Reports, p. 566.

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gistrate's clerk who heard it, and that he may refresh his memory by the aid of the written paper.

Clarkson then further objected, that, as the rules of law required that the best evidence should be given, the parol statement of the clerk was not receivable. The paper ought to be used as a confession, or the evidence should not be received at all.

GASELEE, J.—After again consulting with Lord *Tenterden*, C. J., said, we are still of opinion that the clerk may give the whole in evidence, refreshing his memory by the written paper.

The confession was then read by the magistrate's clerk in the third person, and the prisoner was convicted and executed.

Walsh and *Brett*, for the prosecution.

Clarkson, for the prisoner. .

In a case which occurred on the Norfolk Circuit, where a statement made by a prisoner, which was proved to have been taken under similar circumstances, as far as regarded the completion of the evidence against him, was offered in evidence.—*Sydney Taylor*, for the prisoner, objected, and cited *Rex v. Fagg*. The depositions were produced, and it appeared

that they had been drawn up as if the whole evidence had been taken before the confession was made. Lord *Lyndhurst*, C. B., rejected the evidence, on the ground that the document was false; but intimated, that he did not consider the objection as tenable, upon the ground mentioned in the authority referred to.

NORFOLK SUMMER CIRCUIT.

1831.

BEFORE LORD LYNTHURST, C. B., AND MR. BARON GARROW.

BEDFORD ASSIZES.

BEFORE MR. BARON GARROW.

REX v. JAMES DEERING and JOHN ATKINSON.

THE prisoners were indicted for burglary in the dwelling-house of John Bull, and stealing a quantity of watches, &c.

Austin, for the prosecution, stated that he should call a person named Westwood, who had been lately discharged from Cambridge gaol, and who would depose to a conversation between himself and the prisoner Atkinson relating to the robbery in question. He was proceeding to state the conversation to the Jury, when—

Smith, for the prisoners, objected, on the ground that various circumstances might arise in the progress of the cause, rendering the conversation inadmissible in evidence; and he submitted that it was better that the Jury should not hear that in statement, which they could not afterwards act upon as evidence.

1831.

July 15th.

A counsel for the prosecution, on opening a case of felony, has in strictness a right to state in his own way a conversation supposed to have passed between the prisoner and a witness whom he intends to call; but, in correct practice, the statement ought to be confined to the *general effect* of the conversation.

A person indicted with others for an offence, but against whom the bill has been thrown out, may, if he be in custody at the time of the trial of the

others, be placed at the bar to be identified as one who was in their company.

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 {
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GARROW, B.—If the counsel for the prosecution thinks fit to open the evidence, I cannot control him (a).

A person named Ward had been indicted with the two prisoners for the offence in question, but the Grand Jury had thrown out the bill against him; but he was present in Court in the custody of the gaoler of Cambridge, having been brought by him to answer this charge, and, being detained in such custody, to be taken back to Cambridge, to answer another charge there. It was proposed on the part of the prosecution to place him in the dock beside the prisoners who were on trial, in order that he might be identified as a person who was in their company.

Smith, for the defence, objected, that as the Grand Jury had thrown out the bill, he was as free from the present charge as if it had never been preferred against him, and therefore ought not to be treated as if the bill had been found and he was actually on his trial.

GARROW, B., said, that there was no doubt as to the right to have the party produced in order that he might be identified; and Ward was, in consequence, placed at the bar. His Lordship afterwards observed, that the same course had been adopted on the trial of Thistlewood and others at the Old Bailey.

Verdict—Guilty.

Austin, for the prosecution.

Smith, for the prisoners.

[Attornies—*Swain & Co.*, and *Isaacs*.]

(a) In a case tried on the same Circuit, in March, 1831, a similar objection was made, and a similar decision given by *Alderson, J.*; but in the case of *Rex v. Swatkins* and

Others, Vol. 4 of these Reports, p. 548, *Bosanquet* and *Patteson, Js.*, were of opinion that the correct practice was only to state the general effect of the conversation.

1831.

BURY ASSIZES.

BEFORE LORD LYNTHURST, C. B.

◆

 REX v. TUFFS.

July 22nd.

THE prisoner was indicted for stealing two heifers, the property of James Suker of Mildenhall. The heifers were not missed by the prosecutor or any person in his service, and the only evidence against the prisoner was his own statement, when questioned on the subject, that he had driven away two heifers from his uncle's premises, "the World's End Dolver," (Dolver meaning, in that part of the country, *a fen*). The prosecutor and another person proved that the prosecutor's farm was called by that name, but they could not undertake to say that there was not any other of that name.

A prisoner, indicted for stealing two heifers, said: "I drove away two heifers from 'the World's End Dolver,' (i. e. Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—*Held*, insufficient to warrant a conviction.

Lord LYNTHURST, C. B., upon this, told the Jury, that, under the circumstances, there was not any evidence of a stealing as to the heifers of the prosecutor; though, if it had been proved that his farm was the only "World's End Dolver," it would have been sufficient.

Verdict—Not guilty.

1831.

July 23rd.

To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the Jury must be satisfied that he was incapable of judging between right and wrong, and at the time of committing the act did not consider that it was an offence against the laws of God and nature,

REX v. OFFORD.

THE prisoner was indicted for the murder of a person named Chisnall, by shooting him with a gun. The defence was insanity. It appeared that the prisoner laboured under a notion that the inhabitants of Hadleigh, and particularly Chisnall, the deceased, were continually issuing warrants against him with intent to deprive him of his liberty and life; that he would frequently, under the same notion, abuse persons whom he met in the street, and with whom he never had any dealings or acquaintance of any kind. In his waistcoat pocket a paper was found, headed, "List of Hadleigh conspirators against my life." It contained forty or fifty names, and among them "Chisnall and his family." There was also found, among his papers, an old summons about a rate, at the foot of which he had written, "This is the beginning of an attempt against my life." Several medical witnesses deposed to their belief, that, from the evidence they had heard (a), the prisoner laboured under that species of insanity which is called *monomania*; and that he committed the act while under the influence of that disorder, and might not be aware that, in firing the gun, his act involved the crime of murder.

Lord LYNTHURST, C. B. (in summing up), told the Jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature? His Lordship referred to the doctrine laid down in *Bellingham's case* (b)

(a) See *Rex v. Hawell*, Russ. Sup. p. 72.
& Ry. C. C. R. 458, cited Carr. (b) The prisoner was indicted

by Sir *James Mansfield*, and expressed his complete accordance in the observations of that learned Judge.

1831.

REX
v.
OFFORD.

The Jury acquitted the prisoner, on the ground of insanity.

Austin and *Palmer*, for the prosecution.

Smith, for the prisoner.

[Attornies—*Last*, and *Leech*.]

for the murder of the Right Hon. Spencer Perceval, and the defence was insanity. According to the statement of the case in Russell on Crimes and Misdemeanors, Vol. 1, p. 10, extracted from Collinson on Lunacy, Addenda 630, the learned Judge, in charging the Jury, told them, "that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt, that, at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder or any other

crime. That, in the species of madness called "Lunacy," where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil, they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement."

HOME WINTER CIRCUIT.

1831.

MAIDSTONE ASSIZES.

BEFORE MR. JUSTICE PATTESON.

1831.

Dec. 8th.

REX v. JAMES HARGRAVE.

An indictment for manslaughter charged, that A. gave to the deceased divers mortal blows at P., in the county of M., and that the deceased languished and died at D. in the county of K.; and that the prisoner was *then and there* aiding in the commission of the felony:—
Held, that the indictment was good, and that the word *there* referred to P., in the county of M.

Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter.

INDICTMENT against the prisoner, as a principal in the second degree in the manslaughter of Richard Dodd.

The deceased, and another person named Cox, (who had afterwards died), met, on the day laid in the indictment, at Islington, and there commenced a pugilistic contest. Having been interrupted by the interference of the police, they proceeded to the Isle of Dogs, where they recommenced the fight; and the deceased, Dodd, in consequence of the injuries which he received, died shortly after his removal from the place of combat, on board the hospital ship *Grampus*, which was then stationed in the Thames, and within the parish of St. Nicholas, Deptford. The indictment stated, that James Cox made an assault on the deceased, at the parish of All Saints, Poplar, in the county of Middlesex, and beat the deceased, giving him divers mortal bruises and contusions, &c.; “of which said bruises and contusions the said Richard Dodd, from &c., until &c., at the parish of St. Paul’s, Deptford, in the county of Kent, did languish &c.; and that he there died; and that the said James Hargrave, together with &c., were *then* and *there* present, aiding, abetting, &c., the said James Cox in the commission of the said felony.”

Clarkson, for the prisoner, objected, that the indictment was bad, as it did not with certainty charge the prisoner with the commission of the offence in any particular place; for the word *there* referred to the two parishes mentioned in the indictment, *viz.* All Saints, Poplar, and St. Paul's, Deptford.

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—
REX
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HARGRAVE.

Mr. Justice PATTESON.—The giving of the blows which caused the death constitutes the *felony*. The languishing alone, which is not any part of the offence, is laid in Kent; the indictment states, that the prisoners were then and there present, aiding and abetting in the commission of the said felony; that must, of course, apply to the parish of All Saints, Poplar, where the blows, which constitute the felony, were given; and the words *then* and *there* refer with sufficient certainty to that parish.

The facts of the case, as to the fight, and the presence of the prisoner at it, together with his conduct upon the occasion, were proved by persons who were present at the boxing match. The surgeon who attended the deceased having also been called to prove the injuries which he had received, the case was closed for the prosecution.

Clarkson submitted, that, as all persons who were present at the fight were, in the eye of the law, principals in the second degree to the offence, their evidence, as in the case of accomplices, required confirmation.

Mr. Justice PATTESON held, that they were not such accomplices as to require any further evidence to confirm them.

The prisoner was found guilty, and sentenced to fourteen years' transportation.

Bodkin, for the prosecution.

Clarkson, for the prisoner.

[Attornies—*Carttar & Son*, and *Chell*.]

COURT OF COMMON PLEAS.

*First Sitting at Westminster, in Michaelmas
Term, 1831.*

BEFORE MR. JUSTICE PARK.

(Who sat for the Lord Chief Justice.)

1831.

Nov. 10th.

JARMAIN v. EGELSTONE and Another.

A purchaser at an auction cannot recover from the vendor the expenses of preparing the deeds of conveyance of the property, after he has refused to complete the purchase on account of the non-production of certain title deeds, though his attorney prepared the conveyances on the faith of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller, in whose custody they were.

THE first two counts in the declaration stated the sale by auction to the plaintiff of certain freehold property; the undertaking of the defendants to make out a good title, &c.; and their failure to do so; and claimed the expenses which the plaintiff had been put to in the investigation of the title, which had become unproductive in consequence; and certain costs he had incurred in an action against the auctioneer, to recover the deposit, &c.

The *third* count stated, in substance, that certain objections to the title had been made, which were under discussion; and that, in consideration that the plaintiff would, at the request of the defendants, cause the deeds of conveyance of the property to be prepared, they, the defendants, undertook that those objections should be cleared up; and that the plaintiffs did, in consequence, cause the deeds to be prepared; but the defendants did not procure the objections to be cleared up; whereby the deeds became useless, and the plaintiff was put to expense, &c.

There were also the ordinary money counts. Plea—The general issue.

The defendants, who were trustees of certain freehold property, put it up to auction on the 6th of November, 1827; the plaintiff became the purchaser of Lot 1, and

paid 281*l.* deposit, and 16 guineas for a moiety of the auction duty. The property in question came to the trustees from a person named Bates. When the abstract was sent by the defendants' solicitors to the solicitor of the plaintiff, various objections were raised on the part of the latter, many of which were obviated by explanations, &c.; and the difference between the parties was at last reduced to a question as to the production of certain title-deeds, which were not in the possession of the trustees. On the subject of these deeds, the following memorandum was written by their solicitors in the margin of the abstract:—
“ If it should be required, Messrs. Secker & Son will apply to Mr. Eade, of Hitchin, on the subject. At the time Bates made this purchase, Secker, sen., examined all the original deeds, then in the hands of Mr. Eade's agent.”
After this, the plaintiff's solicitor proceeded to draw the conveyance, the draft of which he sent to the defendants' solicitors in January, 1829, and received it back approved, in April. In May, he sent the engrossment, and was, shortly after, informed that it had been executed by the defendants. The title-deeds in question were not produced, and, on that account, the purchase was not completed. The plaintiff brought an action against the auctioneer, in which he recovered back the amount of the deposit and auction-duty which he had paid; and the present action was brought to recover a sum of 170*l.*, being partly for the expenses of investigating the title, partly for costs incurred in the action against the auctioneer, and partly for the costs of preparing and engrossing the conveyances. 112*l.* was paid into Court on the first two counts and the money counts.

Wilde, Serjt., for the defendants.—The expenses of preparing the conveyance are not recoverable. If the plaintiff meant to insist on the production of the title-deeds, he should have done so before the conveyance was prepared and sent for execution. There has been an excess

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of haste on the part of the plaintiff, and the defendants are not to suffer by it. The attorney thought proper to act upon the note in the margin of the abstract, and he must be bound by it. A purchaser has no right to prepare his conveyance, until he has made up his mind to take the estate. It is hard enough upon trustees to be obliged to pay the necessary expenses, and it would be very unreasonable to fix them with such a demand as this.

Talfourd, in reply.—I allow, that, in ordinary cases, the duty of a solicitor is as has been stated. But the third count in this case contains a statement of the special circumstances; and I submit, that the plaintiff may recover, as the solicitors were acting in perfect confidence with each other.

Mr. Justice PARK.—The third count states, that the defendants requested the plaintiff to prepare the deeds. There is no evidence of that. It seems to me, that that count is not proved. His Lordship, in summing up, said —“ Nothing can be more honest than the intentions of the parties; but the question is, whether the conveyance should have been prepared so early. It seems to me, in point of law, that the requisition for the production of the deeds should have been made before; and if that were not the law, trustees would be in a very inconvenient situation. Supposing in this case the money had been paid, and the trustees had distributed it to the different parties interested, they would have to get it all back again. It seems to me, therefore, that the verdict must be for the defendants.”

Verdict for the defendants.

Talfourd and *C. R. Turner*, for the plaintiff.

Wilde, Serjt., and *Secker*, for the defendants.

[Attornies—*G. Smith*, and *Few & Co.*]

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*Last Sitting in London, in Michaelmas Term,
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BEFORE MR. JUSTICE PARK.

DOVER v. MILLS.

Nov. 23rd.

THIS was an action to recover from the defendant, who kept a wine vaults in Skinner Street, Snow Hill, which he also used as a booking-office for goods to be sent by carriers to various places, and, among them, to Hampstead, the value of two trunks of clothes. It appeared from the evidence on the part of the plaintiff, that, about one o'clock on Saturday, the 2nd of April, the trunks, corded together, and covered with matting, were delivered at the defendant's place, and 2*d.* was paid for the booking to a person in the bar; that there was a direction on a piece of strong paper, folded at the edges, and fastened to the cord of the box with a string. It was, "Mrs. Dover, — Longman's, Esq., Hampstead, by Gray." The person who took the boxes told the person in the bar, that they were servants' boxes, and would be wanted, and must be sure to go that day. The entry of the parcel in the defendant's book was—"Mrs. Dover, Hampstead, Gray." The boxes were placed in the wine vaults, in front of the bar, and remained there till half-past five, when the carrier's man took them. He said, that when he put them in his cart, the direction was—"Mrs. Dover, *to be left at the Load of Hay, Hampstead.*" The carrier's man left the boxes at the Load of Hay, and a person called for them very soon after, and took them away, and they had not been heard of since. It was supposed that, while they were in the defendant's custody, some of the persons who came in for liquor, of whom there were many, must have altered the direction, for the purpose of stealing them afterwards.

A booking-office keeper, who also keeps a wine vaults, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be conveniently taken into the bar, behind the counter.

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On the part of the defendant, witnesses were called to shew, that the boxes were not lost sight of during the whole of the time, and that the alteration could not have taken place in the wine vaults. They also said, that the boxes were too large to be conveniently placed elsewhere than in the front of the bar, and that it was usual to put such packages in that part of the premises; but they admitted, that there was but one seat in the room, and that persons who came in frequently sat down upon the goods which happened to be there.

Andrews, Serjt., for the defendant, contended, that, considering the smallness of the remuneration, and the circumstance of the boxes being put in the usual place in which articles of their bulk were deposited, and as they could not conveniently be put elsewhere, there was no evidence that reasonable care and diligence had not been used with reference to the subject-matter, and, therefore, the plaintiff was not entitled to the verdict.

Mr. Justice PARK left it to the Jury to say, whether there was negligence on the part of the defendant. His Lordship said, that, in his opinion, goods ought not to be laid down in a common gin-shop, where there was but one seat, and persons were in the habit of coming in, and sitting down upon the goods which happened to be there. It was the duty of the defendant to take the things into a safe place behind the counter. It could not be supposed that improper persons did not come into places of that description; and a booking-office keeper, who received money, was bound to take care of the things given into his custody, by putting them into a safe place. He then told the Jury, that if they were of opinion that a sufficient degree of diligence, or care, or caution, had not been used, then they should find their verdict for the plaintiff.

Verdict for the plaintiff—Damages 40/.

Bompas, Serjt., and ———, for the plaintiff.

Andrews, Serjt., for the defendant.

[Attornies—*Flower*, and *Harmer*.]

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See the cases of *Newborn v. Just*, ante, Vol. 2, p. 76; and *Butler v. Basing*, Id. p. 613.

Adjourned Sittings in London, after Michaelmas Term, 1831.

BEFORE LORD CHIEF JUSTICE TINDAL.

BOWMAN and Another, Assignees of SMITH & HALL, Dec. 5th.
Bankrupts, v. NORTON and Others.

TROVER for certain bills of exchange.

It was proposed, on the part of the plaintiffs, to ask an attorney's clerk (*a*), what one of the bankrupts had said to him, when he came to consult about the state of his affairs.

This was objected to on the part of the defendants, on the ground that it was a privileged communication.

Taddy, Serjt., for the plaintiffs.—The reason of the privilege only applies to cases where the party himself retains the right of suit; but, where it is transferred to assignees under a commission, the creditors have a right to the evidence, as shewing the bankrupt's motives.

A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk, on the subject of his affairs, is a privileged communication, and cannot be given in evidence in an action by his assignees, for the purpose of shewing his motives.

(*a*) See the case of *Taylor v. Forster*, ante, Vol. 2, p. 195, and the cases referred to.

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J. Williams, for the defendants.—It is no matter whether the bankrupt has the right of suit or not. That is a perfectly new distinction. The change of parties makes no difference in the case.

TINDAL, C. J.—I cannot tell whether the commission may not be set aside; and, suppose it is, are this man's secrets, told to his solicitor, to be let out?

Taddy, Serjt.—My friend does not represent *Smith & Hall*. I represent them as counsel for the assignees. A man may waive his privilege if he pleases; and the bankrupt being represented by his assignees, they have the same right to waive the privilege as he would have had, if he had brought the action.

TINDAL, C. J., was still of opinion that the evidence was not admissible; and put it to *Taddy*, Serjt., whether he had ever known the evidence offered before.

Taddy, Serjt., replied that he had not. And the evidence was not received; but a note was taken by his Lordship of its having been tendered (a).

The case proceeded, and there was a—

Verdict for the defendants.

Taddy, Serjt., and *Hill*, for the plaintiffs.

J. Williams, *Bompas*, Serjt., and *W. Wilde*, for the defendants.

[Attornies—*W. G. Bolton*, and *Rodgers*.]

(a) No motion was made.

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NICHOLS v. HART and Another.

Dec. 5th.

TROVER for a butt of sherry wine. It appeared that the plaintiff purchased a butt of sherry from the defendants, but it was allowed to remain in the docks undelivered. Afterwards he was compelled to make an arrangement with his creditors, and agreed to pay them by instalments, 12s. 6d. in the pound on the amount of his debts; 10s. of it to be secured by bills, and the remaining 2s. 6d. by his own note, at the end of a year. In a conversation which he had with one of the defendants, previous to this arrangement being carried into effect, he requested that the defendants would take the sherry back; but this was declined, the defendant saying that he never took back any thing he had sold, and would rather take a composition than make any alteration in his books; and he added, that the plaintiff might have the wine at any time, on paying the duty. The price of the butt of sherry was, therefore, included in the composition, and the bills were given. An agreement was signed by the creditors, the defendants among the number, to take the bills, and give a release to the plaintiff. The sum against the defendants' names was 339l. Before the bill for the last instalment became due, the plaintiff met the defendant who had made the agreement, and demanded the butt of sherry; but he refused to let him have it, and said, that it had been sold. The defendants were also applied to to sign the release agreed upon, but refused, on account of the dispute about the sherry. They admitted that it had been included in the composition, but said it must have been by mistake, as it would be absurd for them to give the plaintiff a butt of sherry for 12s. 6d. in the pound, when they had never parted with the possession of it.

A. sold to B. a butt of wine, which was not delivered. B. compounded with his creditors, and the amount of the wine was, by A.'s consent, included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine of A., who refused to deliver it:—*Held*, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine with respect to stoppage *in transitu* did not apply under the circumstances.

Hoggins, for the defendants.—There was not any consideration for the promise to let the butt of sherry go at

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12s. 6d. in the pound, the defendants having the right of stoppage *in transitu* at the time. The case of *Hodgson v. Loy* (a) is in point. Lord *Kenyon* there said, that part payment did not take the case out of the general rule with respect to stoppage *in transitu*; and that he should be sorry to let in such an exception, because it would destroy the rule itself; since every payment, however made, even the payment of a farthing by way of earnest, would, if such an exception were introduced, prevent the operation of the general rule of stoppage *in transitu*. This is a case of a promise, raised on part payment, to deliver a butt of sherry. *Feise v. Wray* (b) is also an authority to the same effect as *Hodgson v. Loy*.

TINDAL, C. J.—It appears to me, that there is a very good consideration. If there had been no debt exceeding the amount of the sherry, then the observation might be of some importance. But they get security for the whole debt, which is much better for them. The cases cited are only cases in which the right of stoppage *in transitu* was insisted upon: here it is given up.

Hoggins.—The plaintiff has not shewn that the other creditors came in on the faith of the defendants' signing as to this butt of sherry.

TINDAL, C. J.—That cannot make any difference as to this plaintiff.

Verdict for the plaintiff.

Taddy, Serjt., and *Dundas*, for the plaintiff.

Hoggins, for the defendant.

[Attornies—*Norton & C.*, and *Michael*.]

A MOTION was afterwards made to set aside the verdict, but the Court refused a rule.

(a) 7 T. R. 440.

(b) 3 East, 93.

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ROLFE and Others v. WYATT.

Dec. 9th.

ASSUMPSIT on a bill of exchange by the indorsee against the acceptor. It appeared that the acceptance was given as an accommodation to the drawer, but it did not appear that this fact was known to the plaintiffs. When the bill became due, the drawer applied to the plaintiffs, the holders, and paid them 10% on account, and got them to take another bill for the remainder. There was some contradictory evidence, as to whether the plaintiffs agreed to discharge the acceptor of the first bill from his liability.

Semble, that an indorsee for value, who receives part payment from the drawer of an accommodation bill, and takes a new bill to give time for the payment of the remainder, does not thereby discharge the acceptor, unless he was aware that the acceptance had been given for the drawer's accommodation.

Jones, Serjt., for the defendant, contended, that they had so agreed; but also contended, that, whether they had or not, they could not maintain the action, as their taking the second bill amounted, under the circumstances, to a discharge in point of law.

Whether, if he knew that fact, it would make any difference—*Quære*.

Wilde, Serjt., for the plaintiffs, answered—That, by the custom of merchants, the acceptor was always liable, and was not discharged by giving time to the drawer (a). He also contended, that, on the evidence, any express agreement to discharge the defendant was negatived.

TINDAL, C. J., in summing up, said—The question for your consideration is—Whether, when the second bill was taken, there was an *express agreement* that the bill with the defendant's name to it should be given up; for, if so, then the plaintiffs cannot recover. This is the question that I shall leave to you; and, if the learned counsel for the defendant thinks that I ought to leave any other question to you, he shall have liberty to move the Court upon the subject.

Verdict for the plaintiffs.

(a) *Dingwall v. Dunster*, Doug. 247. But see *Laxton v. Piat*, n. infra.

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Wilde, Serjt., and *Dawson*, for the plaintiffs.

Jones, Serjt., for the defendant.

[Attornies—*G. Vincent*, and *Hodgson & Co.*]

In the case of *Laxton v. Peat*, 2 Camp. N. P. C. 185, and Bayley on Bills, p. 271, which was an action by indorsee against acceptor, it appeared that the bill had been accepted for the accommodation of the drawer, *which circumstance was known to the plaintiff*, who gave value for the bill. When the bill became due, the plaintiff received part-payment from the drawer, and gave him time to pay the remainder, without the concurrence of the defendant. Lord

Ellenborough said, that, as it was an accommodation bill, *within the knowledge of all parties*, the acceptor could only be considered as a surety for the drawer; and, in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal. The plaintiff was nonsuited. See, also, the case of *Rees v. Berrington*, 2 Ves. Jun. 540, and the cases collected in the notes to *Laxton v. Peat*, cited *supra*.

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DE MEDEIROS v. HILL.

When a ship owner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract; but, whether the damages are to be nominal or otherwise, must depend upon the opinion of the Jury as to whether, if the vessel had gone to the place, she would have been able to get in.

THE defendant was the owner of a ship called the *Catherine*, and this action was brought to recover damages for the breach of an agreement entered into by the captain on behalf of the owner, that the ship *Catherine* should, with all convenient speed, after delivering her cargo at Plymouth, proceed to Liverpool, and take in a cargo of salt for Terceira, and, after delivering it at Terceira, should go to St. Michael's, and bring back a cargo of fruit to Europe.

The charter-party was prepared by a broker at Liverpool, and signed by the captain of the vessel on the 27th September, 1830; it was sent up to London on the 28th, and signed by the plaintiff on the 29th. On the 28th, the captain told the broker that he objected to going to Terceira, as it was in a state of blockade; and it appeared that, at this time, vessels were not allowed at Liverpool to clear out for Terceira; and that those who were going there

were obliged to use false papers. The vessel sailed from Liverpool for Plymouth on the 2nd of October, and returned again on the 23rd of November; but it appeared that, instead of going only to Plymouth, she went on to Exeter.

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The breach in the declaration was, that the vessel did not, with all convenient speed, return to Liverpool after delivering her cargo at Plymouth.

It appeared in the evidence for the plaintiff, that it was known in London generally, that Terceira had been declared in as state of blockade. It was also proved, that salt sold at Terceira at 1*l.* a-ton, by wholesale; but, if sold by retail, would have produced, after deducting duty and commission, about 2*l.* a-ton. The salt was to be taken freight free.

TINDAL, C. J., to the plaintiff's counsel.—I want to know whether a ship owner is bound to risk his ship to deliver a single cargo of salt at a place blockaded. It seems to me a case for 1*s.* damages. It is not an answer to the action, but it is not a case for more than nominal damages.

Jones, Serjt., for the plaintiff.—The defendant should shew that this sort of blockade prevented a trading vessel from going to the place.

A witness, who carried on business at Terceira, proved that many ships entered, and many were taken in the latter end of 1829, and the beginning of 1830. This witness said, that, when he left Terceira, in March, 1830, it was blockaded; but when he returned in December, 1830, it was not. He also said that salt was not a prohibited article there.

Taddy, Serjt., for the defendant.—As the salt was to

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go out freight free, the defendant would not have got any thing if he could not have discharged his cargo of salt. He would have been taken if he had gone, as there was a blockade; and, if there had not been a blockade, he would have been in time to bring back fruit, provided he had sailed in November, when he was at liberty to go. At all events, no more than nominal damages can be recovered; but I submit that the action is not maintainable. I shall shew that a letter was received at Lloyd's, on the 18th of March, 1829, from the Foreign Office, stating that intelligence had been received of an effective blockade of the port of Terceira by the existing government. We have nothing to do with the disputes between Don Miguel and Don Pedro; if our government considers the government blockading as an existing government, and the blockade is effective, that is enough, and every contract to elude it is illegal. The ship must either have been taken or have returned. It would have been no advantage to the plaintiff to have brought his salt back.

The letter was then put in and read.

Jones, Serjt., in reply.—The notification of the blockade was in March, 1829, and the contract was in September, 1830. There is no evidence that there was any blockade; and, in point of law, the contract is not illegal.

TINDAL, C. J.—I do not say it is illegal. I shall tell the Jury that it is legal; but it is a question of damages.

Jones, Serjt.—Then, as to the damages; salt was not a prohibited article, and therefore the vessel would not have been in danger of being taken. As the delay in returning from Plymouth was the cause of the injury, the plaintiff is entitled to damages to the amount of the profit on the salt, and also on the fruit, which was to be brought back. It is evident that the objection, on the ground of the blockade, was merely an after-thought.

TINDAL, C. J. (in summing up) said—It seems that the captain did not merely go to Plymouth, but went on to Exeter, and stopped on his return at Fowey. There is, therefore, undoubtedly a breach of the charter-party in that respect. But, when he returned to Liverpool, on the 23rd of November, he objected to the voyage, on the ground that Terceira was blockaded. The defendant's counsel contends, that the blockade made the contract illegal, just as if there had been war between our country and the blockading government. But it does not appear to me, that the mere circumstance of there being a blockade prevented the parties from speculating if they pleased, knowing the fact at the time; yet it may materially affect the question of damages. If the captain had gone, and waited at Terceira for a time, and found the blockade still continuing, the voyage would have been unproductive; yet, if the parties, knowing the fact, chose to enter into a contract like this, the party breaking it is liable to an action. The question is, whether the ship, when she arrived off Terceira, would have been prevented from entering, by an effective blockade, if she had gone there; for, if that were the case, then the verdict should be for nominal damages only. The only evidence as to the nature of the blockade is from a witness who left in March, 1830, at which time there was a blockade, and returned on the 12th December, 1830, at which time there was no blockade. If you think, that though there was a blockade at an earlier period, it did not continue till the time in question, you will regulate the damages accordingly. If you think that the ship would not have found an effective blockade when she arrived, or that, by waiting a reasonable time, she could have got in, then you will not confine yourselves to giving nominal damages. And, with respect to the amount, I think it was rather incumbent on the plaintiff to shew, if he seeks to recover the larger sum for the sale of the salt in the retail way, that he had some person at Terceira, to

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whom it was to be delivered, and who would have so sold it for him; as the duty of the captain would only be to leave it at the place.

Verdict for the plaintiff—100*l*.

Jones, Serjt, and *Shee*, for the plaintiff.

Taddy, Serjt., and *Tomlinson*, for the defendant.

[Attornies—*Lane*, P. & L., and *Harris*.]

IN the ensuing term, an application for a new trial was made; but the Court were of opinion that the case had been properly decided at *Nisi Prius*, and refused a rule.

Dec. 21st.

BREMIDGE and ROBERTS v. CAMPBELL, Knt.

Two of the electors of a borough went to a banker there, and said, they wished to draw checks upon the bank. The banker promised to honour any checks they might draw. The checks drawn were signed by one only, but the account in the banker's books was opened in the joint

ASSUMPSIT for money paid, &c.

The plaintiffs were two of the electors of Barnstaple, and the defendant a candidate to represent that borough in Parliament. It appeared that, a short time before the election, the plaintiffs went to a banker's in Barnstaple, and said they wished to draw checks upon the bank; and the bankers promised to honour their checks. There was no evidence of any joint payment of money into the bank; and all the checks on the bank were signed by one of the plaintiffs only. There was much contradictory evidence

names:—*Held*, that they might maintain a joint action against the candidate, in whose interest they were, if he adopted the payments made.

Semble, that, where the same sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; and it is not the less so, though all the candidates agree in the payment of the same amount. But it is for the Jury to say, in an action by an agent of the candidate, to recover the amount from his principal, whether the money was *bond fide* paid for expenses, and expenses only.

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as to whether the payments sought to be recovered were or were not *adopted* by the defendant, as having been made by the plaintiffs for the advancement of his interest in the borough. It appeared clearly that it was not distinctly known at the time when several of the payments were made, whether the defendant would stand for the borough or not, though a requisition had been sent to him. A considerable portion of the money was spent in payments of 20*l.*, 15*l.*, 10*l.*, and 6*l.*, to various voters, who came from London, Bristol, and other places, as for their expenses. There were three candidates; and it was agreed among them, that a voter from London, giving a plumper, should receive 20*l.* from the candidate for whom he voted; and that one who voted for two should receive 10*l.* from each. The expenses of voters from other places were also agreed upon, at a certain sum. It appeared also, that the defendant's solicitor and agent had deposited 1000*l.* at another bank in the place, for the purposes of the election.

Taddy, Serjt., at the close of the plaintiffs' case, applied for a nonsuit, on the ground that there was no evidence of a joint right of action in these plaintiffs. There was no proof of joint liability, or joint payments by them to the bankers; and all the checks drawn appeared to be in the name of one only.

Spankie, Serjt.—According to the evidence, there was a joint fund of credit; and that would have the same effect as a joint fund of money.

TINDAL, C. J.—If there was *bond fide* a joint fund of credit, it is the same as if there was a joint fund of money. I do not think that I can withdraw the case from the Jury; it must go to them, with my observations.

In the course of the cause, it was objected, that the

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sums paid for travelling expenses could not be recovered, being evidently given as bribes; being of the same amount to each person coming from the same place.

TINDAL, C. J.—I shall leave it to the Jury to say, whether they believe that the money was given *bond fide* for expenses or not. Each voter from the same place receives the same sum. Now, their expenses could not be the same sum exactly; one might come by steam, and another by coach.

Spankie, Serjt., stated, that the Committee of the House of Commons, on a former election for Barnstaple, had allowed 10*l.* for the expenses of out-voters from London.

Merewether, Serjt., stated, that the Evesham election had been declared void, on this very ground, that the expenses were all the same sum.

Taddy, Serjt., addressed the Jury for the defendant.

Spankie, Serjt., in reply, (as to the expenses).—It is not bribery; because bribery is to give one candidate an advantage over another; and, where all parties agree in the same course of proceeding, it is not bribery.

TINDAL, C. J., in summing up, said—There are three questions for your consideration—*first*, Whether the defendant ever authorized the outlay on his account—and, *secondly*, Whether the money was advanced out of any fund in which the plaintiffs were jointly interested. These two questions go to the maintenance of the action; and, if you find them both in the affirmative, then will come the *third* question, *vis.*—How much the plaintiffs are entitled to recover; and that will depend upon the nature of the payments. If any of them were made to bribe the voters to vote for Sir Colin Campbell; or, if any part comes within

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the provisions of the treating act, those sums cannot be recovered. I dissent from the opinion given by the counsel for the plaintiffs, that it is not bribery if all parties agree in giving a certain sum for expenses. The question on the *first* point is, whether Sir Colin Campbell, or his agent, with a knowledge of the payments of the plaintiffs, adopted their acts. If it was merely, that the plaintiffs were holding in embryo a certain number of votes, ready for *any third* candidate, not caring who it might be, that will not fix Sir Colin Campbell. On the *second* point, as to the joint claim, it seems that both the plaintiffs came to the bankers, and desired to open an account there; though it is a little singular that we do not find any check with both names to it. On the *third* point, to what extent the payments made are recoverable, it will be for you to say, as to the sums paid to the several voters, whether they were paid really and *bond fide* for travelling expenses, and travelling expenses only, or were paid to induce them to give their votes. The question is, whether any part was paid as a *bonus*, over and above the actual expenses of the party. If the payments were made for travelling expenses only, it seems somewhat singular that all the voters should be paid alike. It seems that 6*l.* was given to a man who lived only a few miles from Barnstaple, who certainly, in the first instance, would not require travelling expenses at all. But it is said, that this is no matter, because the other parties agreed, and therefore it is not bribery. But it seems to me, that that only shews that all parties agreed in setting the statute at defiance. You will say, whether the money was honestly paid, merely for travelling expenses; and, if you think it was not, then you will strike off such sums as you think exceeded a reasonable sum for the expenses.

Verdict for the defendant.

Spankie, Serjt., and *Manning*, for the plaintiffs.

Taddy and *Merwether*, Serjts., and *Platt*, for the defendant.

[Attornies—*Davison*, and *Pyne*.]

1831.

Dec. 22nd.

ILLIDGE v. GOODWIN.

If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer by, in striking the horse.

THE declaration stated, that the plaintiff was possessed of certain goods and porcelain, in a certain shop window; and that the defendant was possessed of a cart and horse, which, through the negligence of his servant, was backed against the window, and broke the china; whereby the plaintiff was put to expense, &c.

It appeared, from the evidence of the plaintiff's shopman, that the plaintiff was a china-man in St. Paul's Church Yard, and that, between eight and nine in the morning of a day in June, a scavenger's cart, with the name of Joseph Goodwin upon it, backed against the window of the plaintiff's shop, and broke a quantity of china; and that the carman was not there at the time, but came up very soon after.

It was then proposed to give in evidence certain statements made by Joseph Goodwin, sen.

Spankie, Serjt., objected to the evidence, and stated that he was in a situation to shew, that Goodwin, sen. was not the person against whom the action was brought, but his son, Joseph Goodwin the younger.

TINDAL, C. J.—Somebody has appeared under the name of Goodwin. It is only evidence against that person. They must take out execution against that person; and, if they take it out against a wrong person, he may bring an action of trespass. If you shew that the person making the admission is not the owner of the cart, that will be important.

Spankie, Serjt., replied, that he was the owner of the cart, but was not the defendant.

TINDAL, C. J., admitted the evidence; and the witness proved that Goodwin, sen. had said that the horse was given to backing, and it was very wrong of the man to leave it in the street.

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Spankie, Serjt.—This action has been brought against Joseph Goodwin, the son. He was the person served with process, and he notified to the attorney on the other side, that his father was the owner of the cart. I apprehend that, when, with full knowledge, they have brought the action against the son, they cannot recover.

TINDAL, C. J., again intimated his opinion, that all this was matter for an application to set aside the execution.

Spankie, Serjt.—Suppose a man is indicted for felony by the name of Joseph Goodwin, is he to be convicted because his name is Joseph Goodwin, though it appears that he was not the person who committed the offence; and it is the same thing in an action as on an indictment. The question is, whether young Goodwin was the person who committed this *delictum*. If he was not, a verdict cannot be given against him. But, supposing the right person to have been sued, yet the plaintiff is not entitled to recover. I shall shew that the horse was a very quiet one, and that a person passing by whipped him and made him move. This person is responsible, and not the owner of the horse. It is similar to the case of a thing thrown (*a*). This will make it a question, whether it was such an accident as they are entitled to recover for, on the ground of negligence. Leaving a spirited horse is negligence; but leaving a steady one, which would not move if left to himself and not struck, is not negligence.

The attorney who conducted the defence was then called, and proved that he was retained by Goodwin the

(*a*) See *Scott v. Shepherd*, 3 Wilson, 403.

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younger, and that he told the clerk of the plaintiff's attorney, at the time of pleading, that the action was brought against the wrong person.

To make out the defence opened by *Spankie*, Serjt., two witnesses were called, who swore to the striking of the horse by a person passing by; and one added, that the horse backed against the window in consequence of the bad management of the plaintiff's shopman, who came out and laid hold of his head. During the cross-examination of the second of these witnesses, the Jury interposed, and said they did not believe the evidence of either of them.

TINDAL, C. J.—After all, supposing them to be speaking the truth, it does not amount to a defence. If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done.

A witness was then called, who proved that he served the writ, which was directed to "Joseph Goodwin," on Joseph Goodwin, the son; that he went, for the purpose of serving it, to the residence of Goodwin, the father, and saw young Goodwin in the yard, and asked him if Mr. Joseph Goodwin was in. He said—"My name is Goodwin;" upon which the witness served him, and told him it was in consequence of his cart having backed against Mr. Illidge's window; adding, that a letter had been sent, offering to wait a week, but no answer had been returned, and therefore they had proceeded. He said—"Yes, I know we have had a letter; it is a hard case; we have been at the expense of putting in a window; it was no fault of our men; some of Mr. Illidge's men must have laid hold of the horse." The witness further proved, that, when the declaration was served, young Goodwin said—"I'll give it him in the morning—he is not in now."

TINDAL, C. J.—No one can doubt that the father knew very well all that had been done.

Spankie, Serjt., proposed to call the father to prove that the cart was his, and not his son's.

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TINDAL, C. J.—I think, upon the evidence before me, I must take him to be the defendant. There is evidence enough. He offered to pay money. On the facts, there is evidence of practice between the father and the son.

R. V. Richards, for the plaintiff.—It would be good service even on motion. *Rhodes v. Innes* (a).

The Jury then, under his Lordship's direction, found a

Verdict for the plaintiff—18*l.* 14*s.*

Bompas, Serjt., and *R. V. Richards*, for the plaintiff.

Spankie, Serjt., for the defendant.

[Attornies—*Gale*, and *Butler*.]

(a) 5 M. & P. 153; and see *Godefroy v. Jay*, ante, Vol. 3, p. 192.

IMASON v. COPE.

Dec. 23rd.

ASSAULT and battery. Plea—Not guilty (b).

The plaintiff was a tradesman, and also a freeman and liveryman of London, and, on the 9th of July, went

One of the marshals of the city of London, whose duty it was, on the day of a public meet-

ing in the Guildhall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—*Held*, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way.

(b) By statute 21 Jac. 1, c. 12, general issue and give special matter in evidence.
s. 5, constables, &c. may plead the

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to the Guildhall for the purpose of seeing the freedom of the city presented to Lord John Russell. After the ceremony was over, the plaintiff was coming out, and, in consequence of a cry of "make way," accompanied by clapping of hands, as if some person of consequence was coming, when he had got just outside the entrance, he stood up in front of a crowd which had there assembled, when the defendant, who was one of the City Marshals, and whose duty it was to see that a passage was kept clear for the nobility and members of the corporation to pass to their carriages, came up to him and told him to stand back. The plaintiff replied, that he could not, on account of the persons behind. Upon which the defendant immediately struck him a blow on the face, saying that he would make him stand back. This was the assault complained of.

Wilde, Serjt., for the defendant, submitted, that it was essential for an officer, whose duty it was to contend with a crowd, to act with great vigour and promptness; particularly as bad characters take advantage of a mob to create confusion for the purposes of plunder. And if he did, under the difficulties arising at the moment, use a little more violence than persons looking on merely might think was necessary, he ought to be protected if he was acting in a way which he thought necessary to discharge his duty and accomplish the object he had in view.

TINDAL, C. J. (in summing up) said—"This is an action for assault and battery. The plaintiff contends that he has received bodily injury from a blow given by the defendant, which the defendant is not in a condition to justify. He therefore seeks at your hands a fair compensation in damages. The circumstances out of which the assault arose took place on the occasion of Lord John Russell's coming to the city, when a considerable crowd had collected, and when there was a considerable pressure on getting out of the Guildhall. If the defendant was, at the

time, acting in the performance of his duty, undoubtedly any act he did in the fair execution of that duty might have been justified by him on the present occasion. The question you have to consider is, whether the course he took with respect to this plaintiff was not an excess of the duty he had to perform, and of the authority he then bore with him? Because, if it was, you are then bound to give to the plaintiff a fair compensation in damages for any injury occasioned in that manner. Undoubtedly, the defendant would be justified in using a moderate degree of pressure to remove a person opposing those for whom he was bound in the discharge of his duty to make a passage. Or, if any resistance occurred, then a more violent degree of pressure might be used. But it does not appear that any resistance was offered to the authority of the defendant beyond that which the necessity of the case, that is, the pressure of the crowd behind the plaintiff, rendered on his part absolutely necessary. Therefore, you have to say whether a blow, which appears to have been struck instantly, without any attempt to remove the plaintiff by other means, was or was not an excess of the authority which the defendant exercised at that moment. His Lordship stated the evidence, and then said—As it stands at present, it appears to me, it is a blow struck where no blow ought to have been struck; that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way. It appears to me not in this particular instance to have been an act done in keeping the peace, but, by too violent an exertion on the part of the defendant at the moment, rather the breaking of the peace than the keeping of it. At the same time, taking the whole of the circumstances into consideration, there appears to have been a great pressure, and a great degree of what we might almost call irritation going on at the time. Therefore, you will give that fair and moderate

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compensation in damages which you think the case requires.

Verdict for the plaintiff—Damages 5*l*.

Andrews, Serjt., and *Payne*, for the plaintiff.

Wilde and *Stephen*, Serjts., for the defendant.

[Attornies—*Greenfield*, and *W. L. Newman*.]

First Sitting in London, in Hilary Term, 1832.

BEFORE MR. JUSTICE PARK.

(*Who sat for the Lord Chief Justice*).

1832.

Jan. 19th.

SMITH v. SAINSBURY.

A witness formed his opinion of the hand-writing of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved:—
Held, sufficient.

ASSUMPSIT. It became necessary, on the part of the defendant, to prove the hand-writing of Mary Smith, whose name was written as the attesting witness to an agreement, purporting to be signed by the plaintiff.

For this purpose, the defendant's attorney was called. He stated, that he believed he was acquainted with Mary Smith's hand-writing; that he never saw her write, but that he had observed the name of Mary Smith signed to an affidavit which had been used by the plaintiff's counsel, in answer to an application to postpone the cause, and which was filed. In the affidavit it was sworn, that Mary Smith was the plaintiff's wife.

Jones, Serjt., objected, that this was not evidence.

Mr. Justice PARK.—I think as you, the plaintiff's coun-

sel, used the affidavit, the Jury are bound to believe at least that your client did not think it was a fraud. If it was a mere comparison of hand-writing, it would not do. But it is not so, the witness says he took notice of the signature, and, in his mind, formed an opinion which enables him to swear to his belief. I have no doubt that it is evidence.

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Jones, Serjt., and Kelly, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Lofty, and Boydell.*]

Third Sitting in London, in Hilary Term, 1832.

BEFORE MR. JUSTICE GASELEE.

(*Who sat for the Lord Chief Justice.*)

PERRYMAN v. STEGGALL and Another.

Jan. 26th.

ASSUMPSIT on two promissory notes given by the defendants, as sureties for one Tucker. The fact of the notes having been signed for Tucker's accommodation was opened by *Andrews, Serjt.*, who, in stating the defendants' case, said, that he should call him as a witness.

Questions may be put on the *voir dire* to a witness by the party who calls him, in order to shew his competency, though no question has been asked by the opposite counsel to shew a disqualification; the objection being founded on the opening speech.

Bompas, Serjt., for the plaintiff, on Tucker being put into the box, objected to him as incompetent without a release.

Hoggins, (who was with Andrews, Serjt.), proposed to

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ask him, on the *voire dire*, whether he had been discharged under the Insolvent Debtors' Act.

Bompas, Serjt., objected, that no question could be asked by the defendants on the *voire dire*, as none had been asked on the part of the plaintiff; and that, at all events, under such circumstances, the witness could not be allowed to give evidence of a discharge which could only properly be proved by the written discharge itself. It was only where a witness was shewn to be disqualified by examination on the *voire dire*, that he could set himself up again without the production of documents.

GASELEE, J., was of opinion that the question might be asked.

The question was then put, and the witness replied that he had been discharged after the date of the notes, and that they were inserted in his schedule.

Bompas, Serjt., then objected that this was not sufficient, as his future effects were liable, though his person was discharged.

GASELEE, J., was of opinion, that, if a release of the costs of the action was given, the witness might be examined.

This release was given, the cause proceeded, and there was eventually a—

Verdict for the defendants.

Bompas, Serjt., and *Justice*, for the plaintiff.

Andrews, Serjt., and *Hoggins*, for the defendants.

[Attornies—*Sylvester & W.*, and *Darke*.]

COURT OF KING'S BENCH.

Sitting in London, in Hilary Term, 1832.

BEFORE MR. JUSTICE JAMES PARKE.

SEDGWICK v. JAGER.

Jan. 30th.

ASSUMPSIT on a bill of exchange, drawn by the defendant on one Isaac Malden, and made by him, in the written acceptance, payable at the house of a person named Taylor.

It was proved that the bill was presented at Taylor's house, which was not the acceptor's residence, and notice of dishonour was given to the defendant, the drawer; but there was no proof of the handwriting of the acceptor.

Where a bill is by the acceptor made payable at a particular place, which is not his residence, proof of presentment at that place is not sufficient evidence of dishonour in an action against the drawer, without proof of the acceptor's handwriting.

Mr. Justice J. PARKE was of opinion, that, without such proof, there was not evidence of dishonour; as, to make out dishonour, there must be presentment at the acceptor's residence, or at such other place as he by his acceptance appointed instead; and it did not appear, without proof of his handwriting, that he did appoint any other place.

Nonsuit.

Steer, for the plaintiff.[Attornies—*Allen*, and *Jager*.]

1832.

Jan. 30th.

To make a husband liable for his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shewn, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and did not make any offer to take her back, except upon conditions which he had no right to make.

REED v. MOORE.

ASSUMPSIT for board and lodging, furnished to the defendant's wife, and her servant, and a lap-dog.

The claim for the lap-dog was disallowed, as not being for necessaries. With respect to the other part of the case, it appeared that the defendant and his wife had quarrelled, and she took out a warrant against him for an assault; but the charge was abandoned, on a negotiation being entered into. After this, they quarrelled again; and, upon the wife's attempting to leave the room, for the purpose of calling for the landlord to interfere, the defendant laid hold of her, to prevent her; and, according to his own admission, he was very much annoyed, and used more violence towards her than he should otherwise have done. In consequence of this, she left his house, and went to reside at the house of the plaintiff. It appeared, that the defendant was aware that his wife was living at the plaintiff's house, but made no offer to take her back, and was not willing to receive her, unless she would consent to give up a certain portion of the property which was settled upon her.

Mr. Justice J. PARKE, (in summing up), said—If it had depended on the question of violence, one should have wished for some more evidence, as a wife is bound to live with her husband, unless he makes it improper for her to do so. The defendant might be only keeping his wife from doing something which she had no right to do. But it seems he made no offer to take her back, except upon a condition, that she should give up some of her property. Now, this he had no right to do. A husband is bound to maintain his wife, whether she has money or not. I think, therefore, on these facts, that you may find your verdict for the plaintiff.

Verdict for the plaintiff.

Cary, for the plaintiff.

[Attorney—*Begbie*.]

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

Sittings at Westminster after Hilary Term, 1832.

BEFORE LORD TENTERDEN, C. J.

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—
REX v. ELIZA SMYTH and Three Others.

Feb. 1st.

INDICTMENT for a forcible entry into the house of William Henry Carmichael Smyth. Plea—General issue.

It appeared that the defendant Mrs. Smyth was the wife of the prosecutor Mr. Carmichael Smyth, and that she, under the description of Mrs. Anne Smyth Carmichael, had, on the 12th of November, 1829, taken the house in question for her own residence; and that Mr. Smyth and

An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such shew of force, as is calculated to prevent any resistance.

If a wife, separated from her husband, take a house of which the husband, with the landlord's consent, obtains possession:—*Seemle*, that if the wife come with others and make a forcible entry into this house, she may be convicted on an indictment for a forcible entry, stating it to be the house of the husband.

If a married woman take a house, in which a burglary is committed, the house must be laid as the house of the husband, although she be living separate from him.

Where a constable entered a house with a warrant in his hand, and searched it, and for such entering and searching was indicted for a forcible entry:—*Held*, that his counsel might ask the witnesses for the prosecution what the constable said at the time as to whom he was searching for.

Where an indictment is tried at *Nisi Prius*, the *nisi prius* record does not shew what names were on the back of the indictment.

Where an indictment is founded on a written instrument, and where the instrument itself is the crime, it is receivable in evidence, although not stamped; but where the indictment is for an offence distinct from the instrument, and the instrument be only introduced collaterally, it cannot be received unless it be properly stamped.

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his servant, on the 17th November, had gone to the house with the consent of the landlord, and obtained possession of it, a man named Teresias being by them put into possession. It was also proved, that, on the 18th of November, Mrs. Smyth came to the house with two or three men, and knocked at the door; and that, on being refused admittance, Mrs. Smyth and one of the men got over the railings in front of the house; and the man, having broken a pane of glass, pushed down the upper sash of the window and got into the house, and he having opened a door, Mrs. Smyth went in and told Teresias that he had better go out peaceably, or they would put him out. Teresias then went out, leaving Mrs. Smyth and her party in possession.

C. Phillips, for the defendants Goddard and Schofield, who were constables, applied to have Mr. Smyth called as a witness, as his name was on the back of the indictment.

LORD TENTERDEN, C. J.—The original indictment is not here, and the *nisi prius* record does not shew what names were on the back of the bill.

Mr. Smyth was not called (*a*).

Cockburn, for the defendant Mrs. Smyth.—I submit that my client must be acquitted. She is indicted as the wife of the person whose house she is charged with having entered. It is clear, that no man could be indicted for a forcible entry into his own house, neither, as I submit, can a wife be indicted for a forcible entry into the house of her husband. Mr. Serjeant *Hawkins* says (*d*)—"It seems

(*a*) On the trial of an indictment for a forcible entry under the statute 8 Hen. 6, c. 9, and 21 Jac. 1, c. 15, the party dispossessed is not a competent witness for the prosecution. *Rex v. Wil-*

liams, 4 M. & R. 471, and 9 B. & C. 549.

(*b*) 1 Curw. Hawk. B. 1, c. 28, s. 32, citing Moore, 786; Cro. Jac. 18; 2 Keb. 495.

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clear that no one can come within the intention thereof (*i. e.* of the statutes relating to forcible entry), by any force whatsoever done by him in entering into a tenement whereof he himself had the sole and lawful possession both at and before the time of such entry, as by breaking open the door of his own dwelling-house, or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, or by forcibly entering into the land in the possession of his own lessee at will." That being so, I submit that the possession of the wife and the husband is identical, as the common law takes no notice of any separate possession of the husband and wife. Indeed, the possession of one is not only the possession of the other, but it is the duty of the wife to be in the house of her husband, and as she cannot be a trespasser in entering the house of her husband, she cannot be guilty of this offence, as it includes a trespass. Great inconvenience would be sustained if such indictments as the present could be preferred, as the wife could have no remedy against her husband for malicious prosecution.

LORD TENTERDEN, C. J.—If a married woman takes a house, and a burglary be committed in it, it must be laid as the house of the husband, although she be living separate from him; therefore, this house is properly laid as the house of Mr. Smyth. If it was a mere trespass, I quite agree with you, that the wife could not be a trespasser; but if she comes with a number of persons, and with the strong hand, I have great doubts, because it tends to a breach of the peace. However, you can have the advantage of this point hereafter, if it should become necessary.

A witness for the defendant stated, that the defendant Goddard searched the house, having a warrant in his hand, Schofield being with him.

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C. Phillips wished to ask the witness, whether, at the time of this searching, Goddard said for whom he searched?

Archbold, for the prosecution.—What Goddard said is not evidence in his own favour.

LORD TENTERDEN, C. J.—We may hear what he said at the time, as to who he was searching for (*a*).

The witness said, that he stated that he was searching for Mr. Smyth.

The agreement under which Mrs. Smyth had taken the house was offered in evidence. It was not stamped.

LORD TENTERDEN, C. J.—Where the indictment is founded on the instrument, the want of a stamp does not signify. That is, where the instrument itself is the crime; but here the indictment is for a forcible entry, and this instrument is introduced collaterally. I therefore cannot receive it without a stamp.

The agreement was not read.

LORD TENTERDEN, C. J., (in summing up).—An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such a shew of force, as is calculated to prevent any resistance. In point of law, although Mrs. Smyth had taken the house separately from her husband, it must be taken to be his house; but still she would have a right to enter the house of her husband. However, if you should think that she came with violence and the strong hand, or at least such shew of force as to prevent any resistance, I think, as at present advised, that she would be guilty of this offence, notwithstanding her being the wife of the

(*a*) See the case of *Rex v. Crutchley*, *ante*, p. 133.

party whose house this is alleged to be. Whether the two officers went for the purpose of increasing the shew of force, is for you to consider; but if you think that they went either to prevent a breach of the peace, or to take Mr. Smyth on a warrant, they must be acquitted. If you acquit them, there only remain Mrs. Smyth and one man. There is no doubt, that a great number of persons being present does increase the shew of force; but, if you think that Mrs. Smith and the third man were all that were concerned in getting possession of this house, you will say whether their presence, and the breaking of a window, is such a shew of force as will satisfy the present charge (a).

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The Jury found all the defendants—Not Guilty.

Archbold, for the prosecution.

Platt and *C. Phillips*, for the defendants *Goddard* and *Schofield*.

Cockburn, for the defendant *Mrs. Smyth*.

(a) See the case of *Milner v. Maclean*, ante, Vol. 2, p. 17.

1832.

Feb. 3rd.

Magistrates have no authority to detain a person known to them till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made.

REX *v.* BIRNIE, Knt., HALLS, Esq., and Others.

INDICTMENT for the false imprisonment of, and for assaulting William Henry Carmichael Smyth.

Mr. Smyth, being called as a witness, said—"On the 15th of December, 1830, I was at the Bow Street Police Office; I went to complain against Goddard the officer; I went in consequence of a rule of the Court of King's Bench; Sir Richard Birnie and Mr. Halls were sitting; Sir Richard Birnie refused to hear the case, and referred me to Mr. Halls. I refused to submit it to Mr. Halls, as the rule was addressed to Sir Richard Birnie. Mr. Halls dismissed the complaint; I bowed, and was about to retire, when Sir Richard Birnie exclaimed, 'Stop him, shut the door, don't let that man escape. Where is the person that has got the information to lay against Mr. Smyth, for tampering with the due course of justice?' I insisted on being let go. A person, named Wotton, was keeping the door. I was repeatedly repulsed by him. He said, 'Why do you attempt to escape, when you know you cannot?' I said, because they would say I acquiesced, and was not a prisoner. There was a long consultation between the magistrates and ten or a dozen officers. Sir Richard said 'This man is a pensioner, we must see and get his pension stopped, a pretty man to be a pensioner, tampering with the due course of justice.' I was kept a quarter of an hour or twenty minutes. Sir Richard Birnie went out at the back door. I was sitting down at the end of the office. Mr. Halls called out Mr. Smyth, repeatedly. I said, I have nothing to say to Mr. Halls; I demand my liberty. The defendant, Birchell, then said, 'If you will not come by fair means, I must take you by force.' He dragged me by the collar across the office, and Mr. Halls said, 'Mr. Smyth, I understood there was an information against you for obstructing the due course of justice, and, as you were present, I considered it my duty to detain you. Now that

I have read the charge, I don't think I should be justified in detaining you any longer; you are discharged.' I said, you may depend on it, Mr. Halls, if there is any law in the country, to which I can have recourse for redress for this outrage, I will have recourse to it. Mr. Halls said 'I might do as I thought proper.'"

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Adolphus, for the defendants, opened, that the magistrates were informed that Goddard, the officer, had a complaint to make against Mr. Smyth, for having tampered with the due course of justice; and that, Goddard not then being at the office, they detained Mr. Smyth till Goddard was sent for. And he contended, that, if a magistrate has a person before him, charged with either felony or misdemeanor, he may either go into the case immediately, or detain the party to await his leisure. And he cited the case of *Broughton v. Mulshoe* (a).

LORD TENTERDEN, C. J.—I am of opinion, that the Justices could not detain a person known to them till some other person should make a charge. I think, before they detain a known person, they should have a charge made; therefore, unless you can shew that Goddard's charge was made by him, and received by the magistrates before Mr. Smyth was stopped, you cannot vary the case; and it is plain that you cannot, as they evidently detain Mr. Smyth till Goddard makes his charge, and then it is found to be not sufficient. However, I will hear any evidence you have to offer.

(a) Moore, 408. This was an action for false imprisonment, in which the defendant justified, "for that the plaintiff being in the presence of a Justice of Peace, and the justice, not having opportunity to examine him, commanded the defendant, being a constable, to take him into his custody

till the next day, which he did." This was held a good justification, without alleging the cause that the justice had for imprisoning the plaintiff, and without shewing a warrant in writing, because it occurred in the presence of the justice.

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Adolphus declined calling witnesses.

LORD TENTERDEN, C. J., (in summing up).—The only question of fact is, whether Mr. Smyth was detained against his will; for I think that a magistrate is not justified in detaining a known person till a charge is made. The magistrate should have the charge actually made before he detains the party.

Verdict—Guilty.

Archbold, for the prosecution.

Adolphus, for the defendants.

[Attornies—*A. H. Smyth*, and *Roche & P.*]

Feb. 3rd.

REX v. POPE and Others.

Where the bankruptcy of a party is stated in an allegation, in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness.

INDICTMENT for a conspiracy to defraud the Sheriff of Middlesex. In the first count of the indictment, the bankruptcy of the defendant Pope was stated in a prefatory allegation.

To prove this allegation, the proceedings under the bankruptcy were put in.

LORD TENTERDEN, C. J.—You cannot put in the assignment, without calling the subscribing witness to prove the execution of it.

This was done.

Verdict—Guilty.

Denman, A. G., and *Bodkin*, for the prosecution.

Curwood, for the defendant Pope.

[Attornies—*Willoughby*, and *Pope*.]

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BEFORE MR. JUSTICE LITTLEDALE,
(*Who sat for the Lord Chief Justice.*)

WHIPPY and Another v. HILLARY.

Feb. 7th.

GOODS sold. Pleas—General issue, and the statute of limitations.

The delivery of the goods was admitted; and, to take the case out of the statute of limitations, the following letter was put in:—

10th October, 1825.

“ Gentlemen—I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements, through which I should be enabled to discharge your account, and which were in progress, not having been completed.

“ I have now the satisfaction to inform you, that an appointment of sufficient funds for this purpose has been signed, of which Henry Young, Esq., 12, Essex-street, Strand, is one of the trustees, to whom I have given in a statement of your account, amounting to 98*l.* 8*s.* 6*d.* It will, however, be unavoidable that some time must elapse before the trustees can be in cash to make these payments; but I have Mr. Young’s authority to refer you to him for any further information you may deem requisite on this subject. I remain, Gentlemen, your obedient servant,

A. W. Hillary.”

A letter, stating that an appointment of funds to pay a debt, due from the defendant to the plaintiff had been made, and that Mr. Y. was one of the trustees; but that some time must elapse before the trustees would be in cash: will not take the case out of the statute of limitations, as it is at most only a promise to pay as soon as the trustees are in cash. But, *scem-ble*, that the creditor’s remedy would be by a bill in equity against the trustees.

Curwood, for the defendant.—This letter is not an absolute, but a conditional promise, and will not support the declaration. This is merely a promise that the money shall be paid out of a particular fund, and not a general promise to pay.

Mr. Justice LITTLEDALE.—I think that this is not suffi-

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cient to take the case out of the statute of limitations; and I think that the plaintiffs ought to have gone to Mr. Young for the money.

For the defence, Mr. Young was called. He stated, that he was not in funds till about three months after the bringing of the present action; and that, as soon as he was so, he sent to the plaintiffs to offer them the sum mentioned in the letter.

Coltman, for the plaintiffs.—I submit that this acknowledgment is sufficient, under the statute 9 Geo. 4, c. 14. It is not necessary that there should be a new promise; an acknowledgment of the debt is sufficient. Here we have an absolute acknowledgment, and the law raises the promise. This is not like the case of a bankrupt's certificate, because there the debt is extinguished.

Comyn, on the same side.—An acknowledgment in writing would be sufficient, although there was not a promise of any kind.

Curwood.—The act of Parliament only requires that to be in writing which before might be by parol. If there be an acknowledgment alone, that will be enough; but, if the acknowledgment be coupled with a condition, you cannot take the acknowledgment without the condition; you must take the whole together.

Mr. Justice LITTLEDALE.—I am of opinion, that this letter is not sufficient to take the case out of the statute. If the acknowledgment be accompanied by a condition, you must take the whole together. In this letter, the defendant refers to Mr. Young. At most it is only a promise to pay when Mr. Young is in funds; but I have great doubts whether the plaintiffs' only remedy is not by a bill in equity against Mr. Young. I shall nonsuit the

plaintiffs, giving leave to move to enter a verdict for the plaintiffs.

Nonsuit, with leave to move.

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Campbell, Coltman, and Comyn, for the plaintiffs.

Curwood and Capron, for the defendant.

[Attornies—*J. Miller*, and *Fladgate, Young, & Jackson*.]

In the ensuing Term, *Campbell* moved to set aside the nonsuit; but the Court

Refused a rule.

See the statute 9 Geo. 4, c. 14, set forth *ante*, Vol. 3, p. 298.

In the case of *Tanner v. Smart*, 6 B. & C. 603, it was held that a promise to pay as soon as the party was able to do so, would not take a case out of the statute of limitations, without proof of his ability.

In the case of *Haydon v. Williams*, 4 M. & P. 811, it was held, that where a written promise to pay a debt, barred by the statute of limitations, has been lost, parol evidence may be given of its contents; but it seems, both from this

case and from that of *Tanner v. Smart*, that, if the promise be conditional, the plaintiff ought to declare specially.

See also the cases of *Robarts v. Robarts*, *ante*, Vol. 3, p. 296; *Ansell v. Ansell*, Id. p. 563; *Chippendale v. Thurston*, *ante*, Vol. 4, p. 98; *Smith v. Forty*, Id. p. 126; *Fearne v. Lewis*, Id. p. 173; *Cory v. Bretton*, Id. p. 462; *Lang v. Mackenzie*, Id. p. 463; and *Dickinson v. Hatfield*, *ante*, p. 46.

As the following case is on the same subject, we have inserted it here.

Sittings in London, after Hilary Term, 1832.

COR. MR. JUSTICE J. PARKE.

GIBSON v. BAGHOTT, Esq.

Feb. 18th.

ASSUMPSIT for goods sold, and work and labour. Pleas—*First*, A defendant had written a letter to T., to make a proposition to the plaintiff respecting a debt he owed him; and in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to the plaintiff, offering an acceptance for 7s. 6d. in the pound on the debt:—*Held*, not sufficient to take the case out of the statute of limitations.

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plication denying the infancy, and alleging that the cause of action was within six years.

To take the case out of the statute of limitations, a letter from the defendant, dated June 6th, 1829, to a person named Turner, was put in. By this letter, the defendant desired Mr. Turner to make a proposition to Messrs. Stultz respecting a debt due from the defendant to them, and then went on as follows:—"Do what you can to arrange with the whole of my creditors, and you will much oblige, dear sir, your's truly, T. Baghott."

Mr. Turner stated, that the defendant mentioned to him the names of all his creditors, and stated that he owed the plaintiff about 27*l.* for saddles and bridles he had had when in the army. It also appeared that on the 27th of June, 1829, Mr. Turner wrote to the plaintiff a letter, in the following terms:—

"5, Wych-street, Drury-lane,
June 27th, 1829.

"Gentlemen,—I am directed by Mr. Thos. Baghott, to offer you 7*s.* 6*d.* in the pound for the amount of your debt due from him to you. Should you be inclined to accept that sum, Mr. T. Baghott will give you his acceptance at three months for the amount. Your debt he states to be about 27*l.* I will join him in the bill, as further security for you, should you be inclined to take it. I shall do myself the pleasure of calling upon you to-morrow, when I trust you will favor me with an answer. I am, Gentlemen, your obedient humble servant,

"Edw. E. Turner."

Addressed—"Messrs. Gibson."

F. Pollock, for the defendant, submitted that this was not enough to take the case out of the statute.

Burston, for the plaintiff.—Here are two letters, the one from the defendant, making Mr. Turner his agent to arrange with his creditors; and the other is a letter from the agent to the plaintiff, acknowledging the debt.

Mr. Justice J. PARKER.—There is nothing signed by the defendant, which acknowledges any debt due to the plaintiff.

Burston.—Must not the two letters be taken together?

Mr. Justice J. PARKER.—I doubt whether the second letter, even if signed by the defendant, would be enough to take the case out of the statute; but, as it is not, I think I must nonsuit the plaintiff.

Nonsuit.

Barstow, for the plaintiff.*F. Pollock*, for the defendant.[Attornies—*J. B. Smedley*, and *C. Bell*.]

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In the case of *Heys v. Heseltine*, 2 Camp. 604, it was held, that an averment in a declaration, that the defendants accepted a bill of exchange according to the custom of merchants, was supported by evidence, that the bill was accepted by John Wilson, their au-

thorized agent, the acceptance being as follows:—"For H. Heseltine and Co. John Wilson." See also the cases of *Hubert v. Moreau*, ante, Vol. 2, p. 528, and *Booth v. Grover*, ante, Vol. 3, p. 335, and the cases there cited.

REX v. SLANEY, Gent., One &c.

Feb. 8th.

INFORMATION for several libels, imputing, that a daughter of Mr. Fane, (who was dead at the time of the libels), had committed adultery with a gentleman named Joddrell.

The *first* count of the information, after setting forth the state of Mr. Fane's family, charged that the defendant wrote and published five anonymous letters to Mr. Fane, and a letter to Mr. Lowndes, and also a printed placard. The *second* count, charged him with printing and publishing the letter to Mr. Lowndes only. The *third* count stated the five anonymous letters, and also certain advertisements in newspapers, without charging any of them to have been either written or published by

A witness is not only not bound to answer a question, the answer to which would criminate him, but he is not bound to answer any question, the answer to which would tend to criminate him. A witness is, therefore, not bound to answer whether he wrote an advertisement referring to libellous letters which the prosecutor had received; and though he is

bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself.

A clerk who has seen numerous letters addressed by a party to his employer, and has acted on those letters, may prove the handwriting of such party.

An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard it was asked if the prosecutor had not received certain warning. The prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard if he had not received the letters:—*Held*, that the letters might be read in evidence as explanatory of the placard, without proof of the handwriting of them.

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the defendant; and then charged that the placard was written, printed, and published by the defendant, of and concerning those letters. The *fourth* count was on the placard alone: but stated the intent to be to vilify Mr. Fane. All the other counts stated the intent to be to vilify Mr. Fane and the memory of his daughter, and to excite discord among the different members of his family. Plea—Not guilty.

It was proved, that the placard was printed by the direction of the defendant; and Mr. Fane proved that he received the letters addressed to him.

A clerk of the defendant, named Evans, was called, and he was asked if he had written one of the advertisements. He objected to answer, because it might criminate him.

Lord TENTERDEN, C. J.—He is not bound to answer.

Sir *J. Scarlett*, (to the witness).—Do you know who wrote it?

Lord TENTERDEN, C. J.—He must answer that.

The witness.—I do.

Sir *J. Scarlett*.—Name the person.

Lord TENTERDEN, C. J.—He is not bound to do that, because it may be himself. You can not only not compel a witness to answer that which will criminate him, but that which tends to criminate him: and the reason is this, that the party would go from one question to another, and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.

The placard was read. It was signed “An Oxfordshire freeholder.” It contained the following passage:—“Were

you not warned that your own character was at stake, by your continuing to associate and connect yourself with a person regarding whom such statements had been long openly talked of? Were you not informed, that it was commonly said, that you knew of and sanctioned his conduct? Did you never have any specific information given you, which would enable you, without inflicting the slightest injury upon any one, to ascertain the truth of such reports? And were you not urged, over and over again, in justice to yourself, not to credit the plausible professions of others, but to inquire and judge for yourself? Were not dates, names, and every particular furnished you for that purpose?"

It was proposed to read the letters, no evidence had been given of the hand-writing; but it was stated by Mr. Fane, that he should not have understood the meaning of the placard if he had not also seen the letters.

Denman, A. G.—I am quite satisfied that your Lordship will not hold that the fact, that the defendant is the author of a placard in which some letters are mentioned, will let in those letters as evidence against him. The other side in effect say thus:—Let us read the letters, and we will shew how they are evidence. It is quite new, that a thing should be received to shew whether it is evidence or not.

Sir J. Scarlett.—I will take the simplest case. Suppose an indictment against a publisher for publishing a book of which he was not the author, and that book referred to another book, without which it was not intelligible. Could it be contended, that the book referred to could not be read in evidence? Whatever is necessary to make a libel intelligible, the prosecutor is entitled to read; and the publisher would not be allowed to say that he did not know it alluded to the former publication. I will assume that the present defendant knew nothing of these

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letters, yet, as the libel published by him refers and alludes to these letters, and is unintelligible without them, he cannot be allowed to say that a part of the entire malignity of the libel shall be kept back from the Jury, because he did not understand it. Such an objection as that can never shut out the evidence against the publisher. It should be observed, too, that the placard distinctly refers to these letters. It says, "Were you not warned? Did you never have specific information?" And Mr. Fane tells us that he received these letters, and that he himself should not have understood the meaning of the insinuations in the placard, if they had not. Whoever was the author of this placard was clearly the author of the anonymous letters; but even admitting that the defendant did not know of the letters, yet, as they are alluded to in the placard, he cannot prevent their being read.

Campbell.—It has been frequently decided, that whatever shews the quality or probable consequences of a libel, ought to be set out, and ought to be proved. In indictments for seditious libels, where the libels refer to public events, which give a quality to them, those events are stated in the indictments, and proved; but if they are not set out, they cannot be proved.

Manning.—If this were an action, the question would be how the public would understand this placard? but being a criminal proceeding, the question is, how Mr. Fane, the party libelled, would understand it. If in this libel it had been said, that the contents of a certain document were true, and that document contained a certain charge, it would be no defence, that the publisher of the libel did not know the contents of that document; and, in the present case, there is an express allusion to the letters in the placard.

Lord TENTERDEN, C. J.—The correct way is to ask Mr. Fane, whether he considered that the placard referred to

the letters; and I will do so now. Mr. Fane, what did you understand by the expressions—"Were you not warned?" and, "Did you never have any specific information given you?"

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Mr. Fane.—I understood those passages to allude to these letters.

Denman, A. G.—It has been said, on the other side, that if a bookseller be charged with a libel, he is to have every thing read in evidence against him which is alluded to in the book that he has published. Now, it seems to be a most dangerous doctrine, that a bookseller, publishing a work in the most innocent language, is to be answerable for other papers of the contents of which he knows nothing. If a book, published by the defendant, says that A. B. is guilty of all that is stated in another book, for this the defendant would be answerable. But, suppose a bookseller to publish a statement, that A. B. walked up St. James's street, could it be said that another paper could be adduced in evidence, in which, walking up St. James's street was coupled with some dreadful offence. *Actio non facit reum sed mens.* Mr. Campbell has instanced the case of public events having been given in evidence: those are admissible because they are known; but this is the case of letters known only to the writer and the receiver; and although there may be some words in this placard which may refer to these letters, or to something else, still that ought not to let the prosecutor into giving evidence of other things said against him at other times, and not by the present defendant.

Lord TENTERDEN, C. J.—My opinion will be confined to the particular facts of this case, and the evidence already given. Mr. Fane says, that the placard refers to the letters, and would not be intelligible without them; and I think, that a defendant, who refers to other papers in

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his publication, must submit to have them read, as explanatory of such publication; but it does not at all follow, that the Jury will be satisfied, that the defendant was either the author or the publisher of those papers.

The letters were read.

To shew that the letters were of Mr. Slaney's hand-writing, a witness, named Richards, was called. He had never seen Mr. Slaney write; but he had seen a number of letters, which purported to have come from him, on the subject of a cause in which he was engaged on one side, and the witness on the other side; and the witness further stated, that he had acted upon those letters in the course of the cause.

Denman, A. G.—Objected to this witness being asked as to the hand-writing of the defendant.

Lord TENTERDEN, C. J.—How do you prove the hand-writing of a person abroad, except by the evidence of those who have corresponded with him?

Denman, A. G.—But there the letters of the party, whose hand-writing is to be proved, have been addressed to the person who has been called to prove it.

Lord TENTERDEN, C. J.—A clerk comes from a merchant's counting-house, and proves the hand-writing of a party by his knowledge of it, acquired by his seeing the letters of the party, which have been received at his master's counting-house. It is frequently done.

The witness was examined as to the hand-writing of the defendant. He said, that they were written in a very disguised hand; but that he believed it to be that of the defendant.

The Jury found the defendant guilty on all the counts of the information.

Sir *J. Scarlett, Campbell, and Manning*, for the prosecution.

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Denman, A. G., F. Pollock, and Follett, for the defendant.

[Attornies—*Stephens*, and in person.]

IN the ensuing Term, an application was made for a new trial, on affidavits. The affidavits went to shew that the defendant was not the writer of the letters; and, at the suggestion of the Court, the prosecutor consented that the verdict of guilty should be entered on that count only, in which the defendant was charged with having published the placard.

ARCHBOLD, Esq. v. SWEET.

Feb. 9th.

CASE. The *first* count of the declaration stated, in substance, that, at the time of the committing of the grievances in this and the next count mentioned, the plaintiff was a barrister, and was the author of divers works and treatises, and, amongst others, had written and prepared for publication, and was the author of a certain book or work, then published in his own name, being a Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, &c., which said book was greatly esteemed and approved of, by which the plaintiff had deservedly acquired great gains in his profession, and as such author. That the plaintiff had prepared a second edition of the last-mentioned book or work, and sold the same, and also the copyright, to the defendant and one R. Phenev, in his lifetime, now deceased; that the second

If A., being the author of a law book, sell the copyright to B., and B. publish a third edition of the work edited by another, but not stated to be so, and which purchasers were likely to suppose was edited by A., such edition having errors and mistakes in it, calculated to injure the reputation of A. as an author:—
Held, at Nisi Prius, that, for this, an action lies by A. against B. The ques-

tion, whether an edition purports to have been edited by A., is a question for the Jury; but the question, whether the alleged errors and mistakes be so or not, and whether they are such as are calculated to injure the reputation of A. as an author, are questions for the Court.

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edition was published; and that the defendant, contriving, &c., “wrongfully and unjustly, and without the leave or license, and against the will of the said plaintiff, printed and published, and caused and procured to be printed and published, a certain edition, being the third edition, as and for, and purporting to be, a third edition, prepared for publication by the said plaintiff, of the said book or work, being a ‘Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, and the Evidence necessary to support them;’ in which said third edition, so printed and published by the said defendant as aforesaid, there were and are divers and very many gross errors, and blunders, and mistakes, and bad, incorrect, and informal precedents, and which were not contained in the previous editions of the book or work;” and, that the plaintiff did not prepare the said third edition of the last-mentioned book or work for publication. The *second* count was similar to the first, except that it did not mention the second edition. The *third* count stated, that the defendant, wrongfully, and without the license of the plaintiff, published a certain edition of the work, (*stating the title of it*), in the plaintiff’s name; and in which edition there were many gross errors, blunders, and mistakes, and bad, incorrect, and informal precedents, and such as are not warranted by law. The *fourth* count stated, that the defendant caused the third edition to be edited and prepared for publication “by some person who was grossly ignorant of criminal law;” and that the defendant “well knew that such person had introduced into the said third edition, so edited and prepared for publication as last aforesaid, divers and very many gross errors, blunders, and mistakes, and bad and informal precedents, and such as are not warranted by law;” yet, that the defendant, further contriving &c., “wrongfully and unjustly published, and caused and procured the same to be published, in the name of the said plaintiff, and as if he, the said plaintiff, had edited and prepared the same for pub-

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lication; whereas the said plaintiff did not edite the said last-mentioned third edition, or prepare the same for publication." The *fifth* count stated, that the defendant caused a book, purporting to be the third edition of the work, (*stating the title*), to be edited and prepared for publication by some person who was grossly ignorant of criminal law; and that the defendant published it as a work written and edited by the plaintiff; "and although the said defendant, shortly after the said last-mentioned book or work had been so published as aforesaid, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, well knew that the said person had introduced into the said last-mentioned book or work divers and very many gross errors, blunders, and mistakes, and bad and informal precedents, and such as are not warranted by law; yet the said defendant, further contriving &c., wrongfully and unjustly continued to publish the said last-mentioned book or work, and to sell and dispose of the same, as and for a book or work written and prepared for publication by the said plaintiff, and as having been prepared for publication and edited by the said plaintiff; whereas, he, the said plaintiff, did not edite the said last-mentioned book or work, or prepare the same for publication, to wit, at Westminster aforesaid, in the county aforesaid:" By means whereof several members of the legal profession, and other worthy subjects of this realm, not knowing the contrary, believed the plaintiff to have been the author of this edition, and to have prepared it for publication, "and to have made and committed the several gross errors, blunders, and mistakes hereinbefore mentioned, and to have written and drawn the several bad and informal precedents hereinbefore mentioned;" and that the plaintiff had been, by means of the premises, greatly injured in his reputation, as such barrister and such author as aforesaid. Plea—Not guilty.

Campbell, for the plaintiff, opened, that the plaintiff was

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the author of several works; and that, after having edited two editions of the work in question, the plaintiff had sold the copyright of it to the defendant and Mr. Pheney; and that it was then understood, that the future editions of this work should be prepared by the plaintiff. However, Mr. Pheney having died, the defendant had published a third edition not edited by the plaintiff, with the following title page:—"A Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, &c., and the Evidence necessary to support them. By J. F. Archbold, Esq., Barrister at Law. Third Edition, with very considerable Additions, including Lord Lansdowne's Act, &c." The title page of the Second Edition, which was edited by Mr. Archbold, was as follows: "A Summary of the Law relative to Pleading and Evidence in Criminal Cases, with Precedents of Indictments, &c., and the Evidence necessary to support them. Second Edition, with considerable Additions and Alterations. By John Frederick Archbold, Esq." &c. If a person (not being the author) edit a work, he ought to put his name to it, that the public might know who was responsible. Indeed, editors sometimes put their alterations within brackets, to shew what part was theirs and what part was the work of the original author; but here there was not the slightest intimation that this edition was not prepared by Mr. Archbold. The address to the reader contained in the second edition was signed J. F. A., and dated Symond's Inn, which was not the case with the address of the third; but still no purchaser would look to that: and what the plaintiff had to complain of was, that this edition was prepared in a slovenly, ignorant, manner. For example, at page 288 of the third edition, in treating of carnally knowing and abusing a female above ten and under twelve, it was stated, that it is immaterial whether the act was done with or without the consent of the female. This was a blunder—*with* consent, it is a misdemeanor; *against* consent, it is a rape. So, at page 156, in stating the evidence necessary to support an indictment

for breaking into a church, it is stated that the prosecutor must prove either a breaking *in* or a breaking *out*, thus stating that evidence of breaking *out* would support an indictment for breaking *in*. There were a great many more errors; however, the great question would be, whether this edition purported to have been edited by the plaintiff.

Mr. M'Dowall proved that he had been employed by the defendant to print the third edition, and that it was not edited by the plaintiff.

Mr. Heaton the barrister was called to point out the errors in the third edition.

LORD TENTERDEN, C. J.—If Mr. Heaton will point out the passages alleged to be erroneous, I will tell the Jury whether they are so or not.

Mr. Heaton pointed out five different passages.

Sir *J. Scarlett*, for the defendant.—I submit that the plaintiff must be nonsuited. The defendant and another have purchased the copyright, and have published a third edition of the work, as they were perfectly at liberty to do. I submit, that this action cannot be maintained without evidence of express malice. If the bookseller employs an editor who does as well as he can, can any action lie? Every count in the declaration states this to have been done wrongfully and injuriously; and I submit, that, to support this action, there must be positive evidence of express malice.

Campbell, for the plaintiff.—It has been held, that any untrue assertion to the injury of another is actionable. A person without fraud assumed to have authority to accept a bill, he really having no authority; and as he accepted *per proc.* a remote indorsee took the bill on the credit of the supposed acceptor. This indorsee sued the acceptor

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and was nonsuited; but after that he sued the supposed procurator, the declaration alleging malice and fraud; and he recovered, although the Jury negatived both the malice and the fraud; and the Court laid down, that where there is an untrue assertion and a damage, an action lies. It will be for the Jury to say here whether the defendant has not published this as an edition prepared by the plaintiff.

Follett, on the same side.—The defendant publishes a book as the plaintiff's, which is not so, to the plaintiff's damage. Surely for that an action lies.

Sir *J. Scarlett*.—The proprietors of the copyright have the greatest possible interest to make the best of the work. I do not say, that if there was express malice, an action might not be maintainable. But the question is, whether the non-insertion of the name of the editor after the words "Third Edition," which words follow the name of Mr. Archbold, will make the defendants liable in this action.

Lord TENTERDEN, C. J.—You shall have leave to move. The class of cases most like the present are those of the perfumers and fish-sauce makers, where one has sold an article made by himself, professing that it was of the manufacture of the plaintiff. The first case of the kind was that of a perfumer. There, the injury was the deteriorating the credit of the plaintiff's commodity; and here, it is the injury to the reputation of an author. I am not prepared to say that an action will not lie.

Sir *J. Scarlett*.—Without evidence, does your Lordship think that the third edition does not shew sufficiently that it was not by Mr. Archbold.

Lord TENTERDEN, C. J.—I have no doubt about that. Taking up this title page and reading it, I should cer-

tainly feel satisfied that the third edition was by Mr. Archbold.

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Mr. Heaton pointed out fourteen more errors; and in his cross-examination he said, that, at page 163 of the second edition, it was stated, that, in *Story's* case, assuming the name of another to whom money was required to be paid by a genuine instrument was *not* within the statutes then in force relating to false pretences. He also stated that the Jury Act, 6 Geo. 4, c. 50, was not mentioned in that edition; and that the indictment for riot and assault, at page 332 of that edition, did not conclude *in terrorem populi*; but he stated, in re-examination, that those particulars in the third edition were left exactly the same as they had been in the second.

On the part of the defendant, the gentleman who edited the third edition was called, he stated, that the defendant applied to him to have his name put in the title page as editor, but that he refused. He also stated, that he was of nearly fourteen years' standing at the bar, and had previously edited another work for the defendant.

Mr. Pheney, junr. (the son of Mr. Pheney who had joined the defendant in the purchase of the copyright) stated, that he had applied to the plaintiff to edit the third edition, and that the plaintiff said he would not edit it again as long as the defendant had anything to do with it. He also stated that the plaintiff had published a work founded on Mr. Peel's Acts six months before the third edition appeared, but that the Lord Chancellor would not grant an injunction to restrain that publication.

Evidence was given by several law-booksellers that they, from seeing the address and the title page of the third edition, should have considered that that edition was not prepared by the plaintiff; and it was stated by the son of the defendant, that he informed all the persons who bought it of him, that it was not edited by Mr. Archbold.

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Lord TENTERDEN, C. J. (in summing up).—The question for your consideration is, whether a person buying this book would suppose that it was edited by the plaintiff. The treatises prepared by the plaintiff had obtained a good reputation, but, as the defendant had bought the copyright of this work, he had a right to publish a third edition; however, this third edition has many errors and mistakes, probably occasioned by negligence and haste. On the part of the defendant, it is contended, that this edition does not profess to be edited by the plaintiff. In point of law, I have told you that there are many errors and mistakes in it; and the plaintiff says that his credit as an author will be injured by these mistakes. The defendant, to shew that it does not profess to be of the plaintiff's editing, has called several law-booksellers, who say, that, looking at the title page and address, they should know that it was not prepared by him. However, it is not quite consistent with that, that one of the witnesses should have informed the purchasers that it was not edited by the plaintiff. I must say, that, looking at the title page alone, I should not have been struck by the change in the placing of the name; perhaps, looking at the addresses also, I should have come to the same conclusion that the booksellers do. It appears that the plaintiff had sold the copyright to the defendant, and a copyright is worth nothing unless future editions are to be published with the alterations made in the law by Acts of Parliament, and also with the more recent decisions, if the work be a law book, and with the recent discoveries, if the work be on any other science. I think that the defendant had a fair right to expect that the plaintiff would have edited the future editions; but, for what reason we know not, he has refused to do so; which clearly authorized the defendant to have another edition prepared by some one else; indeed, another complaint against the plaintiff has been, that he himself has published the new acts with comments; however, that could be no infringement of this copyright, as it related

to matter which took place subsequently to the sale of the copyright. The question of fact is this, whether the third edition would be understood by those who bought it to be the work of the plaintiff; for, if so, I think the errors are such as would be injurious to the plaintiff's reputation. If you are of opinion that the third edition would be understood by those who bought it to have been prepared by the plaintiff, the plaintiff is entitled to a verdict; but if you are of opinion that persons using reasonable care would think that this third edition was not prepared by the plaintiff, your verdict should be for the defendant.

Verdict for the plaintiff.—Damages 5*l.*, with leave to move to enter a nonsuit (*a*).

J. Williams.—There is no evidence that any person was actually misled.

Campbell and *Follett*, for the plaintiff.

Sir *J. Scarlett*, *J. Williams*, and *Lee*, for the defendant.

[Attornies—*Leigh*, and *J. Allen*.]

(*a*) No motion was made.

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Feb. 10th.

WEATHERBY and Another v. BANHAM.

A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came out. W. died, and A., not knowing of his death, continued sending the numbers of the work by the stage coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., and there was no evidence that B. had ever offered to return them:—*Held*, that A. might maintain an action for goods sold and delivered against B., though at the time of the deliveries A. was not aware of the death of W.

ASSUMPSIT for goods sold and delivered. Pleas—*First*, general issue. *Second*, the statute of limitations. Replication, a writ sued out in the year 1830. Rejoinder, no cause of action within six years of that time.

It appeared that the plaintiffs were the publishers of the *Racing Calendar*; and that they had for some years supplied a copy of that work, as fast as the numbers came out, to Mr. Westbrook, who had resided at Maidenhead. Mr. Westbrook died in the year 1820, when the defendant, who had kept an inn at Maidenhead, succeeded to the property of Mr. Westbrook, and went to live in his house. The plaintiffs, not knowing of Mr. Westbrook's death, continued to send the *Racing Calendar*, by the stage coach, directed to him; and a servant of the defendant proved them to have been received by the defendant; and no evidence was given that the defendant had ever offered to return them. This action was brought to recover the price of the *Racing Calendars* of 1825 and 1826.

Talfourd, for the defendant.—I submit, that there was never any contract between these plaintiffs and the present defendant; indeed, it appears, that they did not know him. This form of action, therefore, cannot be supported.

LORD TENTERDEN, C. J.—If the defendant receive the books, and use them, I think that the action is maintainable. These books come addressed to the deceased gentleman, whose estate has come to the defendant, and he keeps the books. I think that the defendant is clearly liable in this form of action.

Verdict for the plaintiff.

F. Pollock and *B. Andrews*, for the plaintiffs.

Talfourd and *Jeffreys Williams*, for the defendant.

[Attornies—*Raimondi*, and *J. Williams*.]

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Adjourned Sittings at Guildhall, after Hilary Term, 1832.

BEFORE MR. JUSTICE J. PARKE,
(*Who sat for the Lord Chief Justice.*)

WARD v. BIRD.

Feb. 18th.

MONEY had and received. Plea—General issue.

It was opened by *Comyn*, for the plaintiff, that, in the year 1826, the plaintiff had compounded with his creditors, and that the defendant had refused to sign the composition deed, unless he was paid in full; and that he was paid 18*l.*, being the full amount of his debt, instead of 6*s.* in the pound, the amount of composition specified in the deed: and he cited *Turner v. Hoole* (a).

The composition deed, executed by the defendant, as a creditor for 18*l.*, and by other creditors for other sums, was put in. By it, the plaintiff stipulated to pay a composition of 6*s.* in the pound, for which he was to give promissory notes. It was also proved, that 18*l.* had been subsequently paid to the defendant.

Mr. Justice J. PARKE.—You do not prove that the notes were given under the composition deed.

A., being a creditor of B., had executed a composition deed, in which it was stipulated that the debt should be paid at 6*s.* in the pound, by promissory notes. After executing this deed, A. obtained payment from B. in full:—*Held*, that B. could not recover back the difference between the full amount and 6*s.* in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof.

(a) D. & R. N. P. C. 27. There the defendant, after he had signed a composition deed in favour of his debtor, the plaintiff, induced the latter to give him bills of exchange for the full amount of the debt, dated on the day before the composition deed bore date; and after receiving one instalment,

sued the plaintiff on the bills, and recovered the amount, minus the instalment paid; and it was held, that the plaintiff might maintain an action for money had and received against the defendant, to recover the difference between the amount of the composition and the full amount of the debt.

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Comyn.—This defendant did not stand on his legal rights; but he signs the deed, and holds out to the other creditors that he is taking the same rate as they do.

Mr. Justice J. PARKE.—You have not proved that you have performed your part of the agreement respecting the composition.

Comyn.—I submit, that, as it is proved that the defendant received 20s. in the pound, it is unnecessary to prove the composition notes.

Mr. Justice J. PARKE.—I think, that you ought to prove that the composition notes were paid, or give some evidence that is equivalent.

Nonsuit.

Comyn, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Lloyd*, and *Hodgson & H.*]

BEFORE LORD TENTERDEN, C. J.

Feb. 20th. JEFFERY and Another, Assignees of PENNINGTON, an Insolvent, v. ROBINSON.

In an action by the assignee of an insolvent, it is necessary to prove the provisional assignment, although, by the Insolvent Debtors' Act, 7 Geo. 4, c. 57, it must be executed at the time of signing the petition, on which the adjudication of the Insolvent Debtors' Court (which is a court of record) is founded.

CASE. The declaration stated, that the insolvent had delivered a mare to the defendant to be sold for the best price that could be gotten; but that the defendant, not regarding his duty, sold the mare for much less than the best price that could be gotten. There were also two

counts in trover. In one of them the conversion was alleged to have accrued before the insolvency, and in the other to have accrued after the insolvency. Plea—General issue.

To prove the title of the plaintiffs as assignees, the adjudication in the Insolvent Debtors' Court, and the order for the insolvent's discharge, were proved, and also the assignment from the provisional assignee to the plaintiffs; but no evidence was given of the provisional assignment from the insolvent to the provisional assignee.

Sir *J. Scarlett* and *Nichols*, for the defendant, contended, that the provisional assignment ought to be proved.

Tancred and *Cooke*, for the plaintiffs.—The Insolvent Debtors' Court is a court of record, and the due execution of the provisional assignment is a necessary step before the adjudication, as, by the Insolvent Act, the provisional assignment is to be executed at the time of subscribing the petition (*a*); it is, therefore, no more necessary to prove

(*a*) By the 11th sect. of the 7 Geo. 4, c. 57, it is enacted, "That such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person, and his or her family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 20*l.*, and of all future estate, right, title, in-

terest, and trust of such prisoner, in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her, before he or she shall become entitled to his or her final discharge in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody without adjudication being made in the matter of his or her petition, then before such prisoner shall be at large and out of custody, and of all debts due or growing due to such prisoner, or to be due to him or

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that than it would be to prove the issuing of a writ to support the proof of a judgment. Your Lordship will, as this is a Court of record, presume that the preliminary proceedings have been duly had.

Lord TENTERDEN, C. J.—That would be a receipt

her before such discharge as aforesaid; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee; and the same shall be made subject to a proviso, that, in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes; and the said Court is hereby empowered to dismiss any such petition in the matter whereof a final adjudication shall not have been made in pursuance of this act, at any time when it shall seem fit to the said Court to dismiss the same: provided always, that where in any case, by leave of the said Court, any amendment shall be made in any such petition, or an amended petition shall be filed as of the date of the original petition, which the said Court is hereby empowered to do and authorize without dismissing such original petition, the assignment and conveyance executed in such case shall not thereby be affected,

but shall stand good to all intents and purposes, notwithstanding such amendment or amended petition so filed as aforesaid."

With respect to the execution of assignments by assignees, it is enacted, by the 2nd section of the statute 2 Will. 4, c. 44, "That from and after the passing of this act, the said assignees shall not be required to execute such counterpart as aforesaid, but that in lieu thereof the said provisional assignee shall execute every such conveyance and assignment as aforesaid in duplicate, and that one part of such conveyance and assignment so executed by such provisional assignee shall be filed of record in the said Court; and that a copy of any such record so made and so purporting to be certified and sealed as by the said first-recited act is directed for evidence of the records therein mentioned in that behalf, shall be recognised and received as sufficient evidence of such conveyance and assignment so to be executed as aforesaid, and of title under the same, as fully and effectually in every respect as the said records are required to be recognised and received by the provisions of the said first-recited act, to all intents and purposes."

for curing every thing. I think the plaintiff must be called.

Nonsuit.

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Tancred and Cooke, for the plaintiff.

Sir *J. Scarlett* and *Nichols*, for the defendant.

[Attornies—*O. Price*, and *L. Norton*.]

TIDMAS v. LEES.

Feb. 20th.

WORK and labour. Plea—General issue.

On the part of the plaintiff, it was proposed to shew by the proceedings in the Palace Court, which were produced by the Prothonotary of that Court, that the action had been originally brought there, and that the defendant had in that Court suffered judgment to go by default.

Sir *J. Scarlett* objected that this evidence was not receivable.

On a trial at Nisi Prius, evidence that the cause was originally commenced in the Palace Court, and that the defendant let judgment go by default in that Court, and afterwards removed the cause by *hab. corp.*, is admissible.

Lord TENTERDEN, C. J.—I must receive evidence that the defendant let judgment go by default in the inferior Court, and then removed the cause by *habeas corpus* into the Court above.

The evidence was received.

For the defence, several witnesses proved that the plaintiff, who was a milliner's workwoman, came into the service of the defendant to improve herself, agreeing not to receive any salary or wages.

Nonsuit.

Erle, for the plaintiff.

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Sir *J. Scarlett*, for the defendant.[Attornies—*D. Willoughby*, and *Mayhew & Co.*]

In the case of *Bottings v. Firby*, 4 M. & R. 567, it was held, that the letting judgment go by default in the Palace Court, where the defendant had afterwards re-

moved the cause by *habeas corpus*, is not *prima facie* evidence of the plaintiff's cause of action, so as to call on the defendant to answer it.

*First Sitting at Westminster in Easter Term,
1832.*

BEFORE MR. JUSTICE TAUNTON,
(*Who sat for the Lord Chief Justice*).

April 19th.

LOWRY, Gent., v. GUILFORD.

An attorney in a cause is not answerable for the absence, neglect, or want of attention in the counsel engaged in it.

ASSUMPSIT for an attorney's bill. Plea—a tender as to part, and non-assumpsit as to the residue. Replication—denying the tender.

The only part of the plaintiff's demand which was in dispute, was for business done in a suit in equity, in which the present defendant was the plaintiff, the present plaintiff being his solicitor. It was proved that the cause in equity was in the paper for hearing in the Vice-Chancellor's Court on the 26th of February, 1830, and that a brief in that cause had been delivered to an eminent counsel at the equity bar on the 11th of that month; and a clerk of the plaintiff's town agent gave evidence as follows:—"I attended the Vice-Chancellor's Court on the 26th February, 1830. I did not see our counsel. The cause was five off, and I went to search for him at the Rolls' Court. The Vice-Chancellor was sitting in Lincoln's Inn, and the Master of the Rolls at the Rolls' Court, in Chancery Lane. I could not find our counsel at the Rolls' Court,

and I went back to the Vice-Chancellor's Court. I was away less than ten minutes; and on my return I found that the cause had been struck out of the paper with others that stood before it. In about five minutes after I heard our counsel address the Court to restore the cause, but he did not succeed in his application."

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Sir J. Scarlett, for the defendant.—The fault here was in the clerk's going away; if he had stayed and said what counsel was in the cause, the counsel would have been sent for. In the King's Bench, if the attorney and counsel are both absent the case is lost, and no new trial will be granted; but if the attorney stays, and says that his counsel is at the Rolls', or any other Court near, he would be sent for, instead of the cause being struck out. There has been a tender of all but this part of the bill; and it has been held that if there is no beneficial service, nothing is to be paid. Here there was no service by reason of the negligence of the attorney.

The tender of the remainder of the demand was proved.

Alexander, in reply.—If the attorney's clerk had sat still instead of going to look for his counsel, it would have been said that he ought to have gone to fetch his counsel. I submit that the clerk did what a prudent man would do, for he went for his counsel when the cause was five off.

Mr. Justice TAUNTON (in summing up).—The question here is, whether you are satisfied that the plaintiff did not use due diligence; and that, instead of using due diligence, he was guilty of gross negligence; and that, in consequence of such negligence, the cause miscarried. It appears that the plaintiff delivered a brief in the equity cause on the 11th February, which was fifteen days before the cause came on. This was certainly no want of diligence. I do not know the practice of the Court of Chancery, but briefs at

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law are generally delivered later than that; and it further appears, that, when the cause was five off, the attorney's clerk went to look for his counsel at the Rolls' Court; and that, being unable to find him, he returned in less than ten minutes. Here I must ask you if this was gross negligence either in the attorney or his clerk. The counsel who practise in equity are in the habit of going from one Court to the other, and neither the clerk nor the attorney could go and say to a gentleman of the bar there—"You must not go to the Rolls' Court, as my cause in the Vice-Chancellor's Court is only five off;" he could not do that, and, as other causes were struck out which stood before this, the probability is, that, if those causes had been heard, this cause would not have met with the fate it did. It is further proved, that the counsel asked to have the cause restored, but was unsuccessful. You are therefore to say whether this misfortune which befel the present defendant, as a party in the equity suit, was not the result of an accident over which the attorney had no control. The attorney is not answerable for the neglect or want of attention in the counsel. He acted for the best in going for his counsel to the Rolls' Court, and it was from an anxiety on his part that he did so. He is not, I repeat, answerable for the absence of his counsel, and his own absence was only caused by his trying to find the counsel. You will, therefore, say whether the attorney was guilty of gross negligence.

Verdict for the defendant.

R. Alexander and *R. C. Nicholl*, for the plaintiff.

Sir J. Scarlett and *Cresswell*, for the defendant.

[Attornies—*Lowry & W.*, and *Francis*.]

Alexander, on a subsequent day in the term, applied for a rule *nisi* for a new trial, on the grounds, that the verdict was against evidence and against the opinion of the

learned Judge. The Court granted a rule, which was afterwards made absolute (a).

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(a) For this information respecting the result of the motion, we are indebted to the kindness of one of the learned counsel engaged in it.

Sittings at Westminster, after Easter Term, 1832.

BEFORE MR. JUSTICE PATTESON,
(*Who sat for the Lord Chief Justice.*)

PAUL v. WHITE.

May 14th.

ASSUMPSIT by an indorsee against the acceptor of a bill of exchange.

A witness, named White, was called for the defendant. He was asked by Sir *J. Scarlett*, on the *voire dire*, whether he had not given a guarantie to the defendant for the payment of this bill; and a letter written by him, containing the guarantie, was put into his hand. It was admitted that this made him interested, and the witness was released by the defendant, and was examined.

If a letter be shewn to a witness for the defendant, on the *voire dire*, to make out that he has an interest, and the witness be released and examined, the Judge will not prevent the plaintiff's counsel from observing on this letter in his reply.

Sir *J. Scarlett*, in his reply, commented on the terms of this letter.

F. Pollock, for the defendant.—I submit that the other side have no right to make any comment on this letter. It was not evidence in the cause. If it had been, it should have been read, and I should have been at liberty to have observed on it. The letter was merely put in to satisfy your Lordship, that the witness had an interest, and was incompetent. It was not read as evidence to be considered by the Jury.

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Mr. Justice PATTESON.—I am of opinion, that, as the document was put in, I cannot prevent the plaintiff's counsel from observing on it.

Verdict for the plaintiff.

Sir *J. Scarlett* and *Moody*, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—*V. S. Reynolds*, and *Pasmore & T.*]

BEFORE MR. JUSTICE TAUNTON,
(*Who sat for the Lord Chief Justice.*)

April 17th.

In an action by the assignee of an insolvent, a letter written by the defendant was given in evidence; on the back of it something had been written by the insolvent:—*Held*, that the defendant's counsel were entitled to have that read.

DAGLEISH, Assignee of BURGE, an Insolvent, v. DODD.

WORK and labour by the insolvent as a builder. Plea—General issue.

On the part of the plaintiff, a letter, written by the defendant, was put in and read. On the back of it was something which had been written by the insolvent.

F. Pollock, for the defendant, wished to have that read also.

Thesiger, for the plaintiff.—I submit that what the insolvent writes is not evidence; and even if it were, the defendant must give it as his evidence.

F. Pollock.—If the paper is put in, I am entitled to have the whole of it read.

Mr. Justice TAUNTON.—I think so: you produce the paper, and if you put it in, the other side have a right to have the whole of it read.

The memorandum on the back of the letter was read.

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Verdict for the plaintiff.

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Thesiger and Channell, for the plaintiff.

Pollock and Steer, for the defendant.

[Attornies—*Brooks & Co.*, and *Arnott & E.*]

AUWORTH v. JOHNSON and Another.

May 14th.

ASSUMPSIT. The *first* and *second* counts of the declaration were on a special agreement to occupy a house, on the terms contained in a certain lease of same house, which had been determined. The *third* count stated, that on &c., at &c., "in consideration that the said plaintiff, at the special instance and request of the said defendants, would permit and suffer the said defendants to occupy certain messuages and premises, as tenants to the said plaintiff, for a certain term, then and there agreed upon by the said plaintiff and the said defendants, at and for a certain yearly rent, the said defendants then and there undertook, and faithfully promised the said plaintiff, that they would perform all necessary and needful repairs on the said last-mentioned premises, and that they would keep and continue the same so repaired, in good and tenantable order and condition; and the said plaintiff in fact saith, that he, confiding in the said last-mentioned promise and undertaking of the said defendants, did permit and suffer them to occupy the said last-mentioned messuages and premises as such tenants as last aforesaid; Yet the said defendants, not regarding, &c., did not perform all necessary and needful repairs, but, on the contrary thereof, utterly neglected the same, and allowed the same

A tenant from year to year of a house is only bound to keep it wind and water tight. A tenant, who covenants to repair, is to sustain and uphold the premises; but that is not so with a tenant from year to year.

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to become ruinous, fallen down, prostrate, and decayed, for want of necessary and needful repairs; and permitted and suffered the same so to remain for a long space of time, to wit, from thence hitherto." The declaration also contained the money counts. Plea—General issue.

No evidence was given to support the *first* and *second* counts, but evidence was given that the defendants were let into possession of the house by the plaintiff; that the stairs of the house were worn out; that new sashes were wanted; that the doors were rotten and falling to pieces from decay; that the sash lines, latches, catches, keys, and locks were broken and damaged; and that a panel of one of the doors was broken.

Hutchinson, for the defendant. — There is no evidence of the terms of any lease.

LORD TENTERDEN, C. J.—No.—The case is, that, in consideration of the plaintiff letting the defendants into possession, they agreed to keep the place in tenantable repair. A tenant from year to year is to keep the premises in a little order, and they say that you have done nothing.

Hutchinson.—They charge for doors and sashes which are worn out; that they hardly ought to do.

LORD TENTERDEN, C. J.—Certainly not.

For the defendants, evidence was given, that the house was situate in Pie-street, and that when the defendants took it, the condition of it was very bad. It was also proved that, in the year 1829, the defendants had employed a bricklayer and carpenter to repair it, and that they put it into as good a state of repair as it was capable of.

Campbell, in reply.—I admit that the defendants are not liable for the substantial repairs; but still they have

not done that which a tenant from year to year ought to do. The sash lines, the broken panel of the door, the latches, catches, locks, and keys, are all, clearly, things which a tenant from year to year ought to make good.

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Lord TENTERDEN, C.J. (in summing up).—It appears that this was a very dilapidated house, when the defendants took it, and that they have had a very considerable quantity of work done upon it. However, the first question is, what are the things which an occupier of a house from year to year, is bound to do. I am of opinion, that he is only bound to keep the house wind and water tight, and that that is all he is bound to do. A tenant who covenants to repair, is to sustain and uphold the premises, but that is not the case with a tenant from year to year. A great part of what was claimed by the plaintiff consists of new materials where the old were actually worn out; for that the defendants are clearly not liable: and if you think the defendants have done all that tenants from year to year ought to do, considering the state of the premises when they took them, the defendants are entitled to your verdict.

Verdict for the defendants.

Campbell and Kelly, for the plaintiff.

Hutchinson and Channell, for the defendants.

[Attornies—*Garry*, and *Lowten & N.*]

In the case of *Ferguson v.* — 2 Esp. N. P. C. 590.—Lord Kenyon said, “A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors which have been broken by him, so as to prevent waste and decay of the premises.”

In the case of *Gibson v. Wells*, 1 N. R. 290, which was an action

on the case against a tenant at will, for *permissive* waste, the Court held, that the action would not lie for permissive waste, although it would have lain for wilful waste.

In the case of *Baker v. Holtzaffell*, 4 Taunt. 45, it was held that the landlord of premises demised under a written agreement might recover, in an action

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for use and occupation against the tenant, the rent accruing after the premises were burnt down, and no longer inhabited by the tenant. But it appears by the case of *Horsefall v. Mather*, Holt, N. P. C. 9, that the tenant would not be bound to rebuild or repair after a fire.

In the cause of *Powley v. Walker*, 5 T. R. 373, it was held that the mere relation of landlord and tenant of a farm, is a sufficient consideration for the tenant's promise to manage the farm in a husbandlike manner. In the case of *Legh v. Hewitt*, 4 East, 160, the plaintiff succeeded in an implied assumpsit in the tenant to manage the farm according to the custom of the country. And in the case of *Horsefall v. Mather*, Gibbs, C. J., said, that a tenant from year to year "is bound to

use the premises in a husbandlike manner, but is not liable to general repairs."

With respect to clerical dilapidations, in the case of *Wise v. Metcalf*, 10 B. & C. 229, the Court held that the incumbent of a rectory "was bound to maintain the parsonage, and also the chancel, and to keep them in good and substantial repair; restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay), and white-washing, and papering belong."

See also the case of *Percival v. Blake*, ante, Vol. 2, p. 514.

Adjourned Sittings at Westminster, after Trinity Term, 1832.

June 20th.

BECKFORD, Esq. v. CRUTWELL.

In stating the *termini* of the journey in declaring against a carrier, the word London will be taken as a *nomen collectivum*, including all that is commonly so called, and not the city merely.

In an action against a carrier

for the loss of a painting, it appeared that the stage waggon in which it was sent had seven horses, but that there was only one waggoner: the L.C. J. left it to the Jury to say, whether the sending but one waggoner was gross negligence; and they found that it was so.

ASSUMPSIT against defendant, as a common carrier from London to Bath, for not safely carrying and delivering a painting, of the value of 80*l.*, sent by his waggon from London to Bath.

The plaintiff proved the delivery of the case containing the painting, at the Old White Horse Cellar, in Piccadilly, in the county of Middlesex; and that twopence was paid for the booking, the book-keeper being told that

it was a painting, no extra carriage or insurance being paid.

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Campbell and *Wyborn*, for the defendant, objected, that, upon this evidence, the plaintiff should be nonsuited, as the *termini* of the journey were not properly described, the Old White Horse Cellar not being in London, but in another county; and they cited *Tucker v. Cracklin* (a), where, on a count stating a contract to carry from the Blue Boar in Whitechapel, in the county of Middlesex, it being proved that the Blue Boar was actually in the *city of London* and not in the county of Middlesex, although the whole neighbourhood commonly went by the name of Whitechapel, the plaintiff was nonsuited.

LORD TENTERDEN, C. J.—The word London is *nomen collectivum* for this purpose, although some convictions against stage-coach proprietors have erroneously proceeded upon this supposed distinction.

The defendants proved an express notice that they would not be liable for parcels above 5*l.* value, unless entered as such, and paid for accordingly (b). But it was proved,

(a) 2 Stark. 385. In the case of *Ditcham v. Chivis*, 1 M. & P. 735, which was an action on the case against a stage coach proprietor for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage coach, for the conveyance of passengers from London to Blackheath, and that the plaintiff had *agreed* to become a passenger, and that the defendant had *agreed* to receive her as such passenger, to be carried from London to Blackheath; and the evidence was, that the words London and Blackheath were painted on the coach door; that the

coach was licensed to run from Charing Cross only; and that the plaintiff was taken up at the Elephant and Castle, in St. George's Fields: It was held, that, as Charing Cross and St. George's Fields are both in common parlance stiled London, the allegation was sufficiently proved.

(b) There has been a great alteration made in the law on this subject, by the statute 11 Geo. 4 & 1 Will. 4, c. 68, by sect. 1 of which it is enacted, "That from and after the passing of this act, no mail contractor, stage coach proprietor, or other common carrier by land for hire shall be liable for the loss of

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upon cross-examination of the defendant's witnesses, that the practice with their waggon was to proceed out of

or injury to any article or articles or property of the descriptions following; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or packages which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as afore-

said, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as herein-after mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." And also, by sect. 2, "That when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge." And also by sect. 4, "That, from and after the first day of September now next ensuing, no pub-

London for one stage with two men, and after that with one waggoner only, changing the waggoner every twenty-five miles. It was also proved, that no stage waggons ever employed more than one waggoner beyond the *first*

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lic notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding." And by stat. 5, "That for the purposes of this act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage coach proprietors, or common carrier shall be

liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid." And also, by sect. 6, "That nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, or any other parties, for the conveyance of goods and merchandizes." And also, by sect. 8, "That nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." But, by sect. 9, carriers, although the value of the goods is declared, are not to be liable for more than the value proved at the trial; and by sect. 10, they may pay money into Court.

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stage, and very few employed (as the defendant did) two waggoners for the first stage.

Sir *J. Scarlett*, for the plaintiff, argued, that, admitting the notice, still that would not justify gross negligence; and he contended, that, if the carriers entrusted a large waggon with seven horses, and all its contents, to the care of one waggoner only, who could not attend to the horses and the goods at one and the same time, it was but natural to suppose this painting would be stolen, as in fact it had been.

Lord TENTERDEN, C. J., left it to the Jury to say—*first*, whether the notice was sufficiently proved or not—and *secondly*, whether, if so, the leaving the waggon and seven horses to the care of only one waggoner was taking such reasonable care as the common law imposed upon carriers, and from which even the notice could not protect them; and his Lordship asked the Jury to state upon which point they found.

The Jury returned a verdict for the plaintiff, stating that their verdict was founded on the *gross negligence* of employing only one waggoner.

Sir *J. Scarlett* and *Platt*, for the plaintiff.

Campbell and *Wyborn*, for the defendant.

[Attornies—*Fownes & W.*, and *Froud*.]

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June 22nd.

MONTGOMERY v. RICHARDSON, Esq., and Others.

FALSE imprisonment. Pleas—the general issue, and several special pleas, which were holden bad on demurrer.

Wyborn, for the plaintiff, proposed to read one of the special pleas, which stated the fact of the suing out of the writ by one of the defendants. He contended, that he was entitled to have the special pleas read, as the Jury were to assess the damages upon them as well as give a verdict on the general issue.

The statements in a special plea, which has been holden bad on demurrer, are not evidence for the plaintiff on the general issue, although the Jury are to assess damages as well as to try the case on the general issue.

Lord TENTERDEN, C. J.—Taking this as a general question, it would be contrary to all the practice in my experience, and I believe in that of every gentleman at the bar, to hold that the statements in a special plea may be evidence under the general issue. Then, as to the particular reason given, Mr. *Wyborn* contends, that, because the Jury are to assess the damages on the special plea, therefore he is entitled to read that plea. I am clearly of opinion that he is not, because there can be no damages on the special plea until the plaintiff has proved his case on the general issue. Now, this he has not done, as he has not proved that the defendant sued out the writ.

Nonsuit.

Wyborn, for the plaintiff.

Hutchinson, for the defendant.

[Attornies—*Frowd*, and *Burt*.]

In the ensuing term, *Wyborn* applied to the Court to set aside the nonsuit; but the Court refused a rule.

See the case of *Firmin v. Crucifix*, ante, p. 98, in which a similar decision upon the general ques-

tion was given by Lord Lyndhurst, C. B.

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*Adjourned Sittings in London, after Trinity Term,
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July 7th.

ARDEN and Another, Gent., two. &c., v. TUCKER.

Two persons in partnership as attornies cannot recover in a joint action for business done in the Palace Court, if it appear that one of them only was a person authorized to practise in that Court.

ASSUMPSIT on a bill for business done as attornies. The business was done in the Palace Court, the costs had been taxed; and on the part of the plaintiffs, a letter was put in, written by the defendant to the plaintiffs, proposing to pay a smaller sum than was due, and asking for a month or six weeks' indulgence. It also appeared that he had made several promises to pay.

Campbell, for the defendant, proved that one of the plaintiffs only was an attorney of the Palace Court, and submitted, therefore, that the two could not maintain the action. He cited the case of *Brand and Another v. Hubbard* (a) as in point, and decisive, and contended, with respect to the promises to pay, that, if there was no liability originally, they would not make any difference in the case. On this point he cited *Collins v. Godefroy* (b). The evidence consisted of the roll of attornies of the Palace Court produced by a witness from the office of the Deputy Prothonotary of the Palace Court, from which it appeared that Mr. Joseph Arden's name only was on the roll, and not those of both the plaintiffs; the warrant to sue, which was in this form, "Joseph Arden is retained to prosecute," &c.; a rule of the Palace Court, commencing, "Upon hearing

(a) 4 B. Moore, 367, and 2 B. & B. 11. That case decides that a replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it be prepared at the office of the firm.

(b) 1 B. & Adol. 950. In this

case, which was an action by an attorney to recover compensation for loss of time in attending to give evidence, it was held, that a promise to pay such compensation, it not being legally demandable, would not support the action.

the plaintiff, and *Mr. Arden*, his attorney, it is ordered," &c. The taxed bill appeared to be headed "Tucker, Esq., to Messrs. Jos. and R. E. Arden." It appeared also that the plaintiffs were in partnership (a).

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Sir *J. Scarlett*, for the plaintiff.—As there were promises to pay made to both, the defendant is precluded from denying his liability. After the bill of both has been treated by him as the bill of both, it is too late for him to object to pay. The case of *Brandram v. Hubbard* has no analogy to the present; because in that case the plaintiffs were only partners as attornies, but not as replevin clerks. There is not any law which says that no person shall have an interest in another's practice, except in the superior Courts, where it is prevented by statutes, which statutes do not apply to such a case as the present.

Campbell.—The action is on the retainer, and not on any forbearance; and therefore the two plaintiffs cannot maintain the action.

Lord TENTERDEN, C. J.—I am of opinion with you. I cannot distinguish this case from that of *Brandram v. Hubbard*. And with respect to the promises to pay, I consider that they must apply to the original cause of action, and do not vary the case. I think, therefore, that the plaintiffs must be nonsuited. But I will give Sir *James Scarlett* leave to move to enter a verdict for them.

Nonsuit, with leave &c.

Sir *J. Scarlett*, *Platt*, and *White*, for the plaintiffs.

Campbell and *Lloyd*, for the defendant.

[Attornies—*J. & R. E. Arden*, and *Tucker*.]

(a) The defendant had given an undertaking in writing to pay what should be found due for the taxed costs. It was not stamped, and an objection was made to its being read; and after argument it was withdrawn without any decision.

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WHITWORTH v. SMITH, FOSTER, and Others.

A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C.; A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them;—*Held*, that, as some rent was due from A. to B., C. was not liable to A. in an action of trover.

ACTION on the case for an excessive distress. The declaration contained several special counts; and among them, a count for distraining for more rent than was due. There was also a count in trover. The defendant Foster, and some of the other defendants, pleaded the general issue. The remaining defendants suffered judgment by default.

It appeared in evidence that the plaintiff was tenant to one of the defendants of certain apartments; and a small sum being due for rent, a distress was made by the defendant, the landlord, for a larger sum than was really due; and for this, the whole of the plaintiff's goods, to a considerable amount, were seized and taken away. Some of the goods were afterwards removed to the rooms of the defendant Foster, who was an auctioneer, for the purpose of sale; and while they were with him, the plaintiff caused him to be served with a notice, stating that the goods had been illegally seized; and desiring him not to sell or part with them. He forbore to sell them; and it appeared that they had afterwards been taken away, and, with the rest, were sold by the person who had originally left them at Foster's.

Barstow, for the defendant Foster, submitted that there was no evidence to affect him with any of the misconduct chargeable upon the original seizure, or the subsequent sale; that he had merely received the goods which had been legally seized for rent, and returned them to the party who brought them to him; that he could neither be liable upon any of the special counts, nor upon the count in trover, which was not maintainable in a case where the original seizure was lawful, and where there was no subsequent conversion.

Lord TENTERDEN.—I am not satisfied that the distress was legal; and, therefore, it must not be so assumed. There is no evidence of any authority to seize, or of any notice, or of the usual formalities of a distress and sale.

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Barstow.—Those are not necessary for the purpose of shewing that the distress was legal at common law. The landlord himself might seize of his own authority; and as he is made a defendant, it must be taken that he did so seize. Notice of a distress for rent was not necessary at the common law. The notice, and the other formalities, prescribed by the 2 W. & M., sess. 1, c. 5, are only necessary where the distrainer desires to proceed to a sale. By the common law the distrainer could not sell; the distress being only in the nature of a pledge; and it is sufficient, to justify such a seizure at common law, to shew the tenancy and rent in arrear. Those two facts are in evidence, and serve to place the goods in legal custody so long as they remained in the possession of the defendant Foster. The cause of action, for want of compliance with the requisites of the statute, may apply to the landlord and the other defendants who proceeded to sell the goods. And the statute 11 Geo. 2, c. 19, s. 19, expressly declares that any irregularity in the dealing with a distress shall not make the party so dealing a trespasser *ab initio*, but refers the tenant to his remedy for the special damage. And upon this it was held in *Wallace v. King* (a), (which has been followed in subsequent cases), that trover will not lie for goods improperly sold under a legal distress.

Dodd, for the plaintiff.—There is enough to maintain the count in trover. The statute 11 Geo. 2, applies in its terms only to cases “where rent is justly due.” Here the rent distrained for was not justly due, as it was in the case of *Wallace v. King*. The distress therefore was not

(a) 1 H. Black. 13.

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TRIAL AT BAR, TRINITY VACATION, 1832.

BEFORE LORD TENTERDEN, C. J., MR. JUSTICE LITTLEDALE,
MR. JUSTICE J. PARKE, AND MR. JUSTICE TAUNTON.

—
REX v. PINNEY, Esq. (a).

The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the King's subjects

to assist them; and all the King's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so.

It is no part of the duty of a magistrate to go out and head the constables, neither is it any part of his duty to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require. Neither is he bound to call out the Chelsea pensioners, any more than the rest of the King's subjects; nor is it any part of his duty to give any orders respecting the fire-arms in the gunsmiths' shops. Nor is a magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that is required of him.

Mere good feeling and upright intention in a magistrate will be no defence, if he has been guilty of a neglect of his duty. Nor will the fact of his having acted under the advice of others be any defence for him. The question is, whether he did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness, and activity.

On the trial of a magistrate for neglect of duty, he ought not to be found guilty, unless all the Jury are satisfied that he has been guilty of the same act of neglect; and if four Jurors think him guilty of one act of neglect, and eight think him guilty of another act of neglect, that is not sufficient.

On the trial at bar of an information, the Special Jury were summoned from a distant county, in which the offence was not charged to have been committed:—*Held*, that the Court had no power to order their expenses to be paid. The Jurors who tried this information were only paid one guinea each, and other Jurors, who had come from the same county, and had been summoned to try another information, which was not tried, were not paid any thing.

(a) Although this is not a *Nisi Prius* case, yet, as it is one of the greatest importance to magistrates, and as no note of the summing up of Mr. Justice *Littledale* was taken by any of the other

gentlemen engaged in legal reporting, we have inserted it here, considering that this report of it will be acceptable to magistrates and the profession.

mitted within the said city and county;" and that, on the 29th of October, "there had been divers tumults, riots, routs, and unlawful assemblies, of great numbers of evil-disposed persons, within the said city and county; and divers and violent breaches of the peace of our Lord the King; and divers violent attacks and outrages had been committed in the said city and county upon the persons and property of divers of his said Majesty's subjects there; whereof the said Charles Pinney, so being such Mayor and Justice as aforesaid, then and there had notice: And the said Attorney-General further says, that, on the next day after the said 29th day of October, to wit, on the 30th day of October, in the year aforesaid, to wit, in the city and county aforesaid, divers wicked and evil-disposed persons, to the number of five thousand and more, whose names are at present unknown to the said Attorney-General, with force and arms, unlawfully, riotously, routously, and tumultuously, assembled themselves together in different parts of the said city and county, armed with iron bars, iron crows, pickaxes, hammers, pieces of wood, and bludgeons, with intent to disturb the public peace, and to make riots, routs, tumults, and affrays, in the said city and county, and to commit breaches of the peace, and outrages upon the persons and property of his Majesty's peaceable subjects there; of all which premises, the said Charles Pinney, so being such Mayor and Justice as aforesaid, then and there also had notice. And the said Attorney-General further says, that divers, to wit, three thousand of the said persons, so being unlawfully, riotously, routously, and tumultuously assembled together, armed as aforesaid, and divers other persons to the said Attorney-General also unknown, afterwards, to wit, on the day and year last aforesaid, at the city and county aforesaid, with force and arms, wickedly and unlawfully attacked, and with the said hammers, pickaxes, iron crows, iron bars, and pieces of wood, forced and broke open a certain common and public gaol or prison there, called the Bridewell,

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and then and there made a great riot, noise, tumult, and affray there, for a long space of time, to wit, for eight hours; and during that time, unlawfully, wilfully, maliciously, and with force, burned, demolished, and destroyed the said gaol or prison, and rescued divers, to wit, one hundred prisoners, who were then and there lawfully confined in the said gaol or prison, and suffered them to go at large; whereof the said Charles Pinney, so being such Mayor and Justice as aforesaid, then and there, to wit, on the day and year last aforesaid, in the city and county aforesaid, also had notice." The information then went on to state, in nearly similar terms, the breaking open of the gaol, the burning and demolishing of "a certain messuage and dwelling house, in the city and county aforesaid, of and belonging to the Lord Bishop of Bristol;" and the burning and demolishing of "divers, to wit, one hundred messuages and one hundred dwelling-houses, of and belonging respectively to divers of his Majesty's subjects, situate in a certain place in the said city and county, to wit, in a certain place called Queen's Square." It then stated, that divers goods were stolen; and that the inhabitants of the said city and county were greatly terrified and alarmed. "Nevertheless, the said Attorney-General, in fact, saith, that the said Charles Pinney, so then and there being such Mayor and Justice of the Peace, as aforesaid, and well knowing of the said riots, tumults, and affrays, and of the said burning, demolishing, and destroying of the said gaols and messuages, and of all other the premises aforesaid; but disregarding, and wilfully and wrongfully neglecting the duties of his said office as such Justice of the Peace as aforesaid, did not then and there suppress or put an end to, or endeavour to suppress and put an end to, or use due means or exertions to suppress and put an end to, the said riots, tumults, and affrays, and to the said burning, demolishing, and destroying of the said gaols and messuages, and the violences, breaches of the peace, and outrages as aforesaid, as he could, and might, and ought to

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have done, or endeavoured to execute the powers and authorities by the laws of this realm vested in him the said Charles Pinney, as such Justice of the Peace as aforesaid, in that behalf; but, the said Charles Pinney, then and there, to wit, on the day and year first aforesaid, and from thence continually during all the time aforesaid, in the city and county aforesaid, wilfully and unlawfully neglected his duty in that behalf, and omitted to suppress and put an end to, and to endeavour to suppress and put an end to the said riots, tumults, and affrays, and the said burning of the said gaols and messuages, and the said violences, breaches of the peace, and outrages aforesaid, and to provide and organize sufficient force for suppressing the same, although he was, on the day and year first aforesaid, and frequently afterwards during the time aforesaid, requested so to do, to wit, in the city and county aforesaid; but, the said Charles Pinney, during all the time aforesaid, wholly refused and neglected so to do, or give such orders and directions as were necessary for restoring peace and tranquillity in the said city and county, and as he, the said Charles Pinney, was of duty bound to have given; and did withdraw and conceal himself, not only from the said persons so unlawfully, riotously, and tumultuously assembled, as aforesaid, but also from all such of his Majesty's loyal and peaceable subjects, then and there being in the said city and county, as stood in need of his, the said Charles Pinney's, orders and assistance, and did wilfully and unlawfully neglect and omit to execute or endeavour to execute any of those powers or authorities by the laws of this realm vested in him the said Charles Pinney, as such Justice of the Peace as aforesaid in that behalf, and did then and there wilfully and unlawfully permit and suffer the said persons, so unlawfully, riotously, and tumultuously assembled as aforesaid, to be and continue so unlawfully, riotously, and tumultuously assembled in the commission of the aforesaid violences,

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burnings, and destructions of property, breaches of the peace, and outrages, for a long space of time, to wit, during all the time aforesaid, to wit, in the city and county aforesaid, contrary to the duty of his said office as Justice of the Peace as aforesaid, in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our said Lord the King, his crown and dignity." The information contained two other counts, stating the same charges more generally: and in these counts the defendant was not stated to be Mayor of Bristol, but only to be "one of the Justices of our said Lord the King assigned to keep the peace in and for the said city of Bristol and county of the same city; and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said city and county." Plea—Not guilty.

The trial occupied seven days. During the first three days, Lord *Tenterden* was present, but evidently suffering much from severe illness; after that period, his Lordship was unable to be present; and the remainder of the trial was before Mr. Justice *Littledale*, Mr. Justice *J. Parke*, and Mr. Justice *Taunton*. The Jury was a Special Jury of the county of Berks (*a*).

Nov. 1st.

Mr. Justice LITTLEDALE (in summing up).—This is an information, filed by his Majesty's Attorney-General, which charges the defendant, as Mayor of Bristol, with neglect of duty; and there can be no doubt, that, if a public officer be guilty of neglect of his duty, he is liable to be prosecuted by information or indictment; but I do not know of any instance of a prosecution similar to the present, except that of Mr. Kennett (*b*), who was charged with not

(*a*) We have not given any statement of the case, as those facts, on which the points of law arise, are stated by the learned Judge in his summing up.

(*b*) See the case of *Rex v. Kennet*, *post*, p. 282. By the statute 13 Hen. 4, c. 7, it was enacted, "That if any riot, assembly, or rout of people against the law be

reading the riot act, in the city of London, at the time of the riots of 1780, and also with the release of some pri-

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made in parties of the realm, the justices of peace, three, or two of them at the least, and the sheriff or under-sheriff of the county where such riot, assembly, or rout shall be made hereafter, shall come with the power of the county, if need be, to arrest them, and shall arrest them." And by the stat. 2 Hen. 5, st. 1, c. 8, it is, after reciting the before-mentioned statute, enacted, "That the King's liege people being sufficient to travel in the county where such routs, assemblies, or riots be, shall be assistant to the justices, commissioners, sheriff, or under-sheriff of the same county, when they shall be reasonably warned to ride with the said justices, commissioners, and sheriff, or under-sheriff, in aid to resist such riots, routs, and assemblies, upon pain of imprisonment and to make fine and ransom to the King. And that the bailiffs of franchises shall cause to be empanelled sufficient persons as before, upon pain to lose to the King 40*l.*, in case that such sufficient persons may be found within the same franchises; and that like ordinances and pains shall hold place and take effect in cities, boroughs, and other places and towns enfranchised, which have justices of the peace within the cities, boroughs and other places aforesaid; and that this statute shall begin to hold place presently after the proclamation thereof made." This statute is thus set forth in the Statutes at Large; but on the Parliament roll it is in French, and

this enactment commences as follows:—"Et qe les lieges du Roy esteantz sufficeantz *pur travailler* en le countee ou tielx routes, assemblies ou riotes sont, soient assistentz as justices, commissioners, viscont, et soutz-viscont de mesme le countee, qant ils serront raisonablement garniz pur chivacher ove les ditz justices, commissioners, et viscont, ou soutz-viscont, en aide de resistance de tielx riotes, routes, et assemblez, sur peine de mprisonement et faire fyn et ranceon a Roy," &c. It seems that the word *travailler* is mistranslated, and that this word *travailler* means "to work," and not "to travel."

In the *Case of Arms*, Popham's Rep. 121, "upon an assembly of all the Justices and Barons, in Sergeants' Inn, this term, on Monday the 15th day of April, upon this question, moved by *Anderson*, Chief Justice of the Common Bench, whether men may arm themselves to suppress riots, rebellions, or to resist enemies, and to endeavour themselves to suppress or resist such disturbers of the peace or quiet of the realm; and upon good deliberation, it was resolved by them all, that every justice of peace, sheriff, or other minister or other subject of the King, where such accident happened, may do it. And to fortify this their resolution, they perused the statute 2 E. 3, c. 3, which enacts, 'That none be so hardy as to come with force, or bring force to any place in affray of the peace; nor to go or ride armed night nor

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soners. However, the case of Mr. Kennett differed from the present, as in his case there were two specific charges;

day, unless he be a servant of the King in his presence, and the ministers of the King in the execution of his precepts or of their office, and those who are in their company assisting them, or upon cry made for weapons to keep the peace, and this in such places where accidents happen, upon the penalty in the same statute contained; whereby it appeareth, that upon cry made for weapons to keep the peace, every man, where such accidents happen for breaking the peace, may by the law arm himself against such evil-doers to keep the peace; but they take it to be the more discreet way for every one in such a case to attend and be assistant to the Justices, Sheriffs, or other ministers of the King, in the doing of it."

This case is cited with approbation by the Judges. Kel. 76.

In 1 Curw. Hawk. c. 28, p. 517, it is said, "It seems clear, that every sheriff, under-sheriff, and also every other peace-officer, as constables &c. may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons whatsoever to assist them therein. Also it is certain that any private person may lawfully endeavour to appease all such disturbances by staying those whom he shall see engaged therein from executing their purpose, and also by stopping others whom he shall see coming to join them; for if private persons may do thus much, as it is most certain that they may,

towards the suppressing of a common affray, surely *à fortiori* they may do it towards the suppressing of a riot. Also it hath been holden, that private persons may arm themselves in order to suppress a riot; from whence it seems clearly to follow, that they may also make use of arms in the suppressing of it, if there be a necessity for their so doing. However, it seems to be extremely hazardous for private persons to proceed to those extremities; and it seems no way safe for them to go so far in common cases, lest, under the pretence of keeping the peace, they cause a more enormous breach of it; and therefore such violent methods seem only proper against such riots as savour of rebellion, for the suppressing whereof no remedies can be too sharp or severe." It is also said, *Id.* p. 513:—"But in some cases, wherein the law authorizes force, it is not only lawful, but also commendable, to make use of it: as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people in order with force to suppress rebels or enemies, or rioters, and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force from making an entry into or detaining of lands."

For the provisions of the Riot Act, 1 Geo. 1, st. 2, c. 5, s. 1 & 2, see *ante*, Vol. 4, p. 442.

whereas here is a charge of general neglect of duty, from Saturday, the 29th of October, till Monday, the 31st of

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Lord *Loughborough*, in his charge to the Grand Jury, on the Special Commission, for the trial of the rioters, in 1780, 21 State Trials, 485, said, "I take this public opportunity of mentioning a fatal mistake, into which many persons have fallen. It has been imagined, that because the law allows an hour for the dispersion of a mob to whom the riot act has been read by the magistrate, the better to support the civil authority, that, during that time, the civil power and the magistracy are disarmed, and the King's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the legislature, nor does the operation of the act warrant any such effect. The civil magistrates are left in possession of those powers which the law had given them before. If the mob, collectively, or a part of it, or any individual, within or before the expiration of that hour, attempts, or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender. I mention this rather for general information, than for the particular instruction of the gentlemen whom I have now the honor of addressing; because the Riot Act, I believe, will not come immediately under your

consideration. Fame has not reported that it was any where, or at any time, read, during the late disturbances."

In the case of *Handcock v. Baker*, 2 B. & P. 234, *Heath, J.*, said, "It is a matter of the last consequence, that it should be known upon what occasions bystanders may interfere to prevent felony. In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed, that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented." And, in the same case, *Chambre, J.*, said, "There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do any thing to prevent the perpetration of a felony."

In the case of *Clifford v. Brandon*, 2 Camp. 370, *Mansfield, C. J.*, said, "If any person encourages or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, he is liable to be arrested for a breach of the peace. In this case all are principals."

Lord C. J. *Tindal*, in his charge to the Bristol Grand Jury, on the Special Commission, on the 2nd of January, 1832, said, "It has been

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that month; and this charge being more vague, it requires therefore more serious attention. It appears that on

well said, that the use of the law consists, first, in preserving men's persons from death and violence—next, in securing to them the free enjoyment of their property; and although every single act of violence, and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuous meetings of the people in a more especial and particular manner produce this effect, not only removing all security, both from the persons and property of men, but for the time putting down the law itself, and daring to usurp its place. The law of England hath, accordingly, in proportion to the danger which it attaches to riotous and disorderly meetings of the people, made ample provision for preventing such offences, and for the prompt and effectual suppression of them whenever they arise; and I think it may not be unsuitable to the present occasion, if I proceed to call your attention, with some degree of detail, to the various provisions of the law for carrying that purpose into effect. In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose;

he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the Judges of England in the time of Queen Elizabeth, in a case called 'The case of arms,' (Popham's Rep. 121), although the Judges add, 'that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this.' It would undoubtedly be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events, the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed than any efforts, however well-intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own re-

Saturday, the 29th of October, Sir Charles Wetherell was to hold the gaol-delivery at Bristol, he being the recorder

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sponsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. And whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe, that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But, where the danger is pressing and immediate; where a felony has actually been committed, or cannot otherwise be prevented; and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities;

the military subjects of the king, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the king to assist them in that undertaking. By an early statute, which is still in force (the 13 Hen. 4, c. 7), any two justices, together with the sheriff or undersheriff of the county, shall come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here, I most distinctly observe, that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly; for in

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of that city; and from the opinions Sir Charles expressed in Parliament on the subject of Parliamentary Reform, it

the succeeding reign another statute was passed, which enacts, 'That the king's liege people being sufficient to travel, shall be assistant to the justices, sheriffs, and other officers upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies, on pain of imprisonment and to make fine and ransom to the king.' In the explanation of which statute, Dalton, an early writer of considerable authority, declares, 'that the justices and sheriff may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants and apprentices, of all other persons being above the age of fifteen years, and able to travel.' In later times the course has been for the magistrate, on occasions of actual riot and confusion, to call in the aid of such persons as he thought necessary, and to swear them as special constables; and in order to prevent any doubt, if doubt could exist, as to his power to command their assistance by way of precaution, the statute 1 Geo. 4, c. 37, and since that has been repealed by the still more recent act of 1 & 2 Will. 4, c. 41, the statute last referred to has invested the magistrate with that power, in direct and express terms, when tumult, riot, or felony was only likely to take place, or might reasonably be apprehended. Again, that this call of the magistrate is compulsory, and not left to the

choice of the party to obey or not, appears from the express enactment of the latter act, that, if he disobeys, unless legally exempted, he is liable to the penalties and punishments therein specified. But the most important provision of the law for the suppression of riots is to be found in the statute 1 Geo. 1, st. 2, c. 5, by which it is enacted, 'That, if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, and being required or commanded by any one or more justice or justices, or by the sheriff, &c., by proclamation to be made in the king's name, and in the form stated in the act, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, notwithstanding such proclamation, unlawfully, riotously, and tumultuously remain or continue together for the space of one hour after such command or request made by proclamation, then such continuing together shall be adjudged felony, and the offenders shall suffer death as felons.' Such are the different provisions of the law of England for the putting down of tumultuary meetings; and it is not too much to affirm, that, if the means provided by the law are promptly and judiciously enforced by the magistrate, and honestly seconded by the co-operation of his fellow-subjects, very few and rare would be

was feared that there would be a riot, and a deputation was sent to London to have an interview with the Secretary

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the instances in which tumultuous assemblages of the people would be able to hold defiance to the laws. Let me impress on the attention of all those who, from idleness, curiosity, or mere thoughtlessness, suffer themselves to form part of a riotous and disorderly meeting, that they subject themselves unconsciously to the danger of punishment for crimes which they never contemplated, for, where many are collected together in the prosecution of an illegal object, it is often impossible to discriminate between the active and unoffending part of the mob. It requires evidence on the part of the accused, which they may not be able to produce in order to defend themselves against the charge of participation in the guilt of others. The only safe course for the peaceable and well-disposed on all occasions of popular tumult, is this, to lend their ready aid to assist the magistrates in suppressing it, or at all events forthwith to separate themselves from the rioters.

“ One class of cases likely to come before you, will be founded upon the statute 7 & 8 Geo. 4, c. 30, s. 8, by which it is enacted, ‘ that if any persons riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully, and with force, demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any house, stable, coach-house, out-house, warehouse, office, shop, mill, &c., every such offender is guilty of

felony, and, being convicted thereof, shall suffer death as a felon.’ In cases of this description, you will consider whether the individual charged was one of the persons constituting a riotous assemblage, which was effecting the destruction of the building. If he formed part of such riotous assembly at the time the act of demolition commenced, or if he wilfully joined such riotous assembly, so as to co-operate with them whilst the act of demolition was going on, and before it was completed, in either case he comes within the description of the offence, and within the penalties imposed by the act, although he may not have been a person who actually assisted with his own hand in the demolition of the building. But the more numerous class of cases seems to be that which is founded upon the second section of the same statute, by which it is enacted that if any person shall unlawfully and maliciously set fire to any house or other building mentioned above, whether the same shall be in the possession of the offender, or in that of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. In this offence you will perceive it is no constituent part of the descriptions in the statute, that the party charged should form one of a tumultuous or riotous assemblage for the disturbance of

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of State on the subject. However, it was determined that the gaol-delivery should be held; and on the 29th of

the public peace: It is an offence that may be committed by a single individual.—You will, therefore, in these cases, inquire, *first*, whether the party set fire to the building himself: in such case, no doubt of his guilt can exist: and if the proof falls short of this, you will then consider whether he was jointly engaged in the prosecution of the same object with those who committed the offence. If, by his word or gesture, he incited others to commit the felony; or if he was so near the spot at the time that he, by his presence, wilfully aided and assisted them in the perpetration of the crime; in either of these cases, the felony is complete without any actual manual share in its commission: and where the statute directs that, to complete the offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbour; and it is unnecessary to observe, that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular

case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shewn to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment, on the ground that the mischief which he committed was wider in its consequences than he originally intended.

“Another class of offenders will be, that of persons who stand charged with acts of plunder and theft, and these may come before you, either aggravated by the circumstance of violence or threats to the person of the owner, or with the circumstance of breaking into his dwelling house, or stealing the property thereout, when the house was already broken open; in both which cases, the offence is considered of a more aggravated nature, and the measure of punishment is consequently more severe; or the facts may assume the shape of a simple larceny of the goods of another; in all which cases, as in the case of arson, before adverted to, all who are present, aiding, assenting, and co-operating in the fact, are in point of law principal offenders. The only other observation I would suggest upon the last-mentioned offence is this, that, where property which has been stolen is found in the possession of any person recently after the theft committed, unless circumstances appear to rebut such presumption, he may be

October, Sir Charles Wetherell came to Bristol. It had been deemed expedient to have three hundred special

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presumed guilty of the theft, until he can explain or prove his innocent possession of the property.

“There is, however, one case which stands in a different situation from the rest, and to which it may be proper that I should call your particular attention, I mean the case of James Cossley Lewis, who is at present at large upon his recognizance, but who stands charged, upon an inquest before the coroner, with the offence of manslaughter, in shooting a boy of the name of Morris. It appears from the depositions before the coroner, that Lewis was acting in aid of the civil authorities, in assisting to clear the streets, after proclamation had been regularly made, requiring the rioters to disperse themselves, and after they had continued together for more than an hour from the time of making proclamation. It appears, also, by the testimony of the witnesses, that the pistol was not aimed at the boy, who was unfortunately struck by the ball. The nature, however, of the offence committed by Lewis will not depend so much upon that fact, as upon the circumstances under which the pistol was originally discharged. If the firing of the pistol by Lewis was a rash act, uncalled for by the occasion, or if it was discharged negligently and carelessly, the offence would amount to manslaughter: but if it was discharged in the fair and honest execution of his duty, in

endeavouring to disperse the mob, by reason of their resisting; the act of the firing of the pistol was then an act justified by the occasion, under the riot act before referred to; and the killing of the boy would then amount to accidental death only, and not to the offence of manslaughter.”

By the statute 1 & 2 Will. 4, c. 41, s. 1, (which wholly repeals the statute 1 Geo. 4, c. 37) it is enacted, “That, in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in *England* or *Wales*, upon the oath of any credible witness, that any tumult, riot, or felony has taken place or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property in any such parish, township, or place as aforesaid, then, and in every such case, such justices, or any two or more justices acting for the same division or limits, are hereby authorized to nominate and appoint, by precept in writing under their hands, so many as they shall think

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constables appointed, which was thought a sufficient force. They were, indeed, not all special constables, as some per-

fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables, for such time and in such manner as to the said justices respectively shall seem fit and necessary for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place; and the justices of the peace who shall appoint any special constables by virtue of this act, or any one of them, or any other justice of the peace acting for the same division or limits, are and is hereby authorized to administer to every person so appointed the following oath; that is to say—

‘I, *A. B.*, do swear, That I will
 ‘well and truly serve our Sover-
 ‘eign Lord the King in the office
 ‘of special constable for the pa-
 ‘rish [*or township*] of _____,
 ‘without favour or affection, ma-
 ‘lice or ill-will; and that I will
 ‘to the best of my power cause
 ‘the peace to be kept and pre-
 ‘served, and prevent all offences
 ‘against the persons and proper-
 ‘ties of his Majesty’s subjects;
 ‘and that while I continue to hold
 ‘the said office I will, to the best
 ‘of my skill and knowledge, dis-
 ‘charge all the duties thereof faith-
 ‘fully according to law. So help
 ‘me God.’

Provided always, that, whenever it shall be deemed necessary to nomi-

nate and appoint such special constables as aforesaid, notice of such nomination and appointment, and of the circumstances which have rendered such nomination and appointment expedient, shall be forthwith transmitted by the justices making such nomination and appointment to one of his Majesty’s principal secretaries of state, and to the lieutenant of the county.”

This statute also contains provisions that the secretary of state, either on the representation of two magistrates, or of his own motion, may order that persons by law exempt shall become special constables; in the former case for two months; and in the latter for three months: and by other sections of this statute, justices may fine those who refuse to be sworn in, or to serve, or who disobey orders; and may make regulations for the special constables, and dismiss them for misconduct. The justices may also order them to be paid out of the county rate; and persons who resist the special constables, may be either fined on a summary conviction, or prosecuted by indictment or information; but special constables appointed under this act are not thereby to gain any settlement, or be exempt from the militia. This statute also contains a form of conviction, and various other details.

In addition to the authorities here set forth and referred to, an opinion given by Lord *Ellen-*

sons refused to be sworn, and persons were hired (about a hundred) to make up the number. At the Guildhall, at Bristol, the Court was opened, and the charter read; and, after some hisses and groans, Sir Charles Wetherell proceeded to the Mansion-house. There the rioting continued, and stones were thrown. The Riot Act was read, and the mob had increased so much that Sir Charles was obliged to leave the town. The mayor again read the Riot Act, and addressed the people; and the military, the constables, and the mob, appeared to have alternately prevailed, and in the course of the evening a boy was unfortunately killed; however, by twelve or one o'clock on that night, all appears to have been quiet. Many persons went home; but the mayor remained in the Mansion-house, and did not go to bed. At about six or seven o'clock on the Sunday morning, the mob assembled in greater force than ever, and Major Mackworth told the mayor, that, as a military man, he considered that he (the mayor) was bound to leave the Mansion-house; and he did so. The Bridewell was next attacked by the mob, and the prisoners released; and after that, the mob destroyed the governor's house at the gaol, and set free the prisoners, whom Sir Charles was to have tried. The mob then destroyed the bishop's palace, and the prison at Lawford's-gate; and, in the evening, they burnt the Mansion-house, the Excise-office, the Custom-house, and two sides of Queen's-square; when they were stopped by the military, and no further mischief was done, and the mob was finally put down. A great number of lives were lost: many who were plundering the houses were burnt to death, by the houses being in flames; and it therefore becomes material to consider whether all this was occasioned by the neglect of the civil or military authorities, or either of them, or whether it was occasioned by the authorities not having sufficient

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borough, when at the bar, on the subject of suppressing riots, will be found in Burn's Justice, tit. Riot.

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force to put down the riot; and you are particularly to consider whether there was any default in the defendant. The information, in the *first* count, alleges, that, on the 29th of October, there was a riot in the city of Bristol, and a great destruction of property; that, on the next day, the rioters attacked and destroyed the Bridewell, and attacked the gaol, and set the prisoners at liberty; that they demolished the bishop's palace, and broke open a number of dwelling-houses, and burnt and demolished those houses; and that the defendant, being mayor, and not regarding the duties of his office, but neglecting the same, did not use due means to put an end to the riot; and that he did not organize a sufficient force, nor give such orders and directions as he ought, and was bound to do; and that he absented and concealed himself, and permitted the rioters to continue assembled for a long time. The other counts of the information are rather more general. Now a person, whether a magistrate, or peace-officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to hit the precise line of his duty: and how difficult it is to hit that precise line, will be matter for your consideration, but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case of mayors and magistrates, or whether, as a peace-officer, he has been compelled to take the office that he holds, the same rule applies; and if persons were not compelled to act according to law, there would be an end of society; but still, you ought to be satisfied, that the defendant has been clearly guilty of neglect, before you return a verdict against him; and here, I ought to remark, that mere good feeling, or upright intentions, are not sufficient to discharge a man, if he has not done his duty. The question here is, whether the defendant did all that he knew was in his power, and which

would be expected from a man of ordinary prudence, firmness, and activity, to suppress these riots. Did he use those means which the law requires to assemble a sufficient force? Did he make all the use of those means which an honest man ought to do by his own personal exertions? According to the testimony of Mr. Serjeant Ludlow, the defendant acted under his advice; he therefore had the best legal advice that a public officer could be reasonably expected to have; and Major Mackworth, who is a man of high military rank, and of great spirit, says, that the defendant was, in a military point of view, willing to act on his advice; and if he acted under such advice, it forms matter for your serious consideration in the course of the case; not that, if the defendant acted contrary to law, it will be sufficient to shelter him, that he acted under the advice of others; still less will it guard him as to matters not within the scope of the advice: however, you will consider whether the advice so given was not the correct advice under all the circumstances. With respect to the not providing a sufficient force, there is no doubt that very great calamities afterwards occurred; but I think you ought not to consider that: for, although, if it could have been foreseen that the military would have been withdrawn and such destruction would have ensued, it was possible that a very large civil force might have been collected by great over-exertion on the part of the magistrates; yet you ought to judge only of what appeared at the time, because, as the magistrates could not foresee all this, they might have collected an immense force, and no riot might have taken place; and then the magistrates would only have been laughed at by every body.

In this information, various acts of neglect are imputed to the defendant—the not assembling a sufficient force—not protecting the gaol—not protecting the palace, &c.—Now if four of you think that one particular act of neglect is proved, and eight of you think that it is not, and those eight should think that another act of neglect is proved,

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which the first four think is not proved; though you should thus all think him guilty of neglect, that is not sufficient, and you ought not to find a verdict against the defendant, unless you all think him guilty of the same act of neglect. The first neglect that is imputed to the defendant is, that he did not assemble a sufficient force, and that he did not head the constables. On this part of the case, it appears that a meeting was held previously to the arrival of Sir Charles Wetherell, and such a number of special constables as was then considered sufficient, was sworn in. You will consider whether the Mayor was to blame so far; but then it is said that he did not go out and head these constables on the Saturday night. Now it is proved that he did go out and read the Riot Act, and that he was actually struck, and that his life was in danger, and he was always near the spot; and it appears to me that a mayor is not bound to go out to head the constables, which is usually the province of the chief constable, who would be likely to do that duty much better than a mayor could be expected to do it; and for any thing that had required the presence of the defendant, it was very easy to have gone to him at the Mansion-house, where he was during the whole of the riots of that evening, the riot at that time being in Queen's-square, in which the Mansion-house itself is situated. It is also alleged that the mayor did not "organize" the constables. The word "organize" is, I believe, a new term in legal proceedings; and I do not think that it ever before found its way into any indictment or information; nor do I believe that it was ever found before in any kind of pleading; I suppose that it means that the defendant should have marshalled and arrayed the constables: but it belonged much more to the chief constables to arrange the men of their wards than for the mayor to do it. However, to all this earlier part of the case there is a general answer to be given, which is, that all was quiet by twelve o'clock on the night of Saturday; and Mr. Hare, the under-sheriff, tells us that the mob, up

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to that time, was not greater than he had seen before at elections. The next thing imputed against the defendant is, that there was a want of energy in his conduct in not ordering the military to fire upon the rioters. Upon this part of the case, it appears that he was intending to do so, but was dissuaded by Colonel Brereton, and also by Major Mackworth; and if the defendant had given an order to fire upon the rioters, and death had ensued, he would, upon an indictment for murder or manslaughter, have had great difficulty to defend himself, if it had appeared that he had given the order to fire against the advice of two distinguished military officers. I cannot say that he could not have made a defence; but a strong *prima facie* case would have been made against him. However, the principal charge up to this time is, that the defendant did not assemble a sufficient force to suppress the riot; and on this charge the statutes 1 Geo. 4, c. 37, and 1 & 2 Will. 4, c. 41, have been referred to on the part of the prosecution. There is, however, in this information no specific charge founded on either of those statutes; and even if there had been, it must have been shewn that regular steps had been taken before the defendant could have acted upon either of those statutes. There is no proof of any deposition upon oath having been made as required by those acts of Parliament; and the majority of the Court are of opinion, that there is, in this case, no question for you to consider on either of those statutes; and that you must, therefore, deal with this case as if they had never been passed; and the great question for you to consider is, whether the defendant has done those things which the general rules of law require of magistrates: which are, that they should keep the peace and restrain rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and the king's subjects are bound to do so. They are to call on the king's subjects, who are bound to assist them upon reasonable warning. One great question is—Has this been done by the defendant in

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this case? If it has, he has done what is required of him by law. It is said, on the part of the prosecution, that there was no plan proposed by the mayor or magistrates; that no magistrates were present to receive those who came to assist them; and that, at the demolition of the prisons, the palace, &c. there was no sufficient force to repel the rioters. No doubt that is a sufficient *prima facie* case to call on the defendant for an answer. Now the answer of the defendant is this, that on the Sunday morning he sent to collect a civil force, and called at several houses, and spoke to persons in the streets; and that it being Sunday, he expected that persons would be at their places of worship, and he could have their attendance sooner than if he had had to send to them at their houses; and he therefore sent to the churchwardens of the parishes and had notices posted and circulated about the town, stating that he wished to assemble a constabulary force, and that the inhabitants of the several parishes should form themselves into bodies and attend him at the Guildhall. This was what the defendant, as mayor, was bound to do; and it appears that these notices were read in the different places of worship; and if sufficient persons had attended in pursuance of these notices, there is great reason to believe that many of the unfortunate circumstances which afterwards occurred would not have taken place. By law, all the king's subjects are to come together upon reasonable warning from the magistrate, and to come to his aid. If this was a reasonable warning, that is all that was required of the defendant. Another question will be, whether this warning was sufficiently early? As the riot was at an end on the Saturday night, it was hardly necessary to send any warning during the night-time, and if the defendant had not waited for the assembling of the people at divine worship, he must have sent out a vast number of messengers, who must have delivered written notices, because, if verbal messages only had been left for them, the people might, and probably would, have affected not

to understand the meaning of the notice. You will, therefore, consider whether the defendant did not act in a proper mode under all the circumstances of the case; and if the defendant did all that the law required of him, he is not liable to be found guilty upon this information. It further appears, that, when these notices had been sent out, many persons would not attend; and that, from one cause or another, not more than one hundred or one hundred and fifty did in fact attend. Now, the population of Bristol being about one hundred thousand, at least twenty thousand might have been fairly expected to attend upon these notices; and even of those who did come some would not act without the military, and others would not act without fire-arms being given to them; and although, in point of law, the defendant might have given fire-arms to them, still it would have been the height of imprudence to have given fire-arms indiscriminately to persons who might not know their use, and who might be under no control, and who, not being used to act together, might have been cut off from the rest of the force, and the arms have by those means got into the hands of the rioters; indeed, Major Mackworth states that it is considered imprudent to put arms into the hands of young troops. In point of law, the defendant would have been justified in giving those persons arms, but it would have been very imprudent for him to have done so. If the defendant did all that he could to assemble a force, it was no fault of his that they would not act; and it appears, on the evidence on both sides, that there was no great disposition to attend to the requisitions of the defendant. It has been said, that the defendant ought to have called out the Chelsea pensioners; but, with regard to that, I apprehend that the defendant was not bound to call out the Chelsea pensioners any more than any other of his Majesty's subjects; and you are to consider, not whether a very extraordinary exertion might not have procured more force,

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but whether the defendant has been guilty of a neglect of that duty which the law has imposed upon him. However, it appears that only about twenty Chelsea pensioners attended, which was but a small number. With regard to the defendant's not making the best use of such force as did come, it appears that there was an indisposition to assist the defendant, because some had a dislike to Sir Charles Wetherell, and others a dislike to the corporation; and at the Bishop's palace, on the Saturday night, we find that of the special constables who had attended, many went away and did not do what they had undertaken; and on the Monday morning we also find that several of the persons who came and offered to become special constables had been seen in the riot the night before; and you will have to consider whether there was any disposition on the part of the people to assist the defendant as mayor. It appears, that by the Monday a much greater force was organized. The services of two hundred men had been offered by a Catholic priest; but that was not till the Monday; and by that time the under-sheriff had organized two thousand seven hundred, or two thousand eight hundred men, and more military had arrived in the city, and a considerable change of feeling had taken place; and it is reasonable to suppose that by that time people felt that, as the burnings continued, no one could tell whose property would be destroyed next. It appears, that, so early as the Saturday evening, something was said about the calling out of the *posse comitatus*, but that that could not be effected that night. Now, the calling out of the *posse comitatus* may be by a justice or by the sheriff; and the calling out of the *posse comitatus* is only the calling out of the people to assist the magistracy; and what was done by the mayor on the Sunday morning was the same in effect, only that there was not the formality of summonses. It has been objected, that the defendant did not keep a force of ten or twelve resolute men to act as

occasion might require: I do not think that that is any part of the duty of a justice of the peace; his duty is to quell riots, but not to keep men to act as occasion may require: besides, the force that the defendant had under his control seems to have been too small to admit of a *corps de reserve* of this kind being taken out of it. Another charge is, that the defendant did not protect the Bridewell; and it is said that a force of twenty resolute men might have protected it: but it seems that the mayor had no such force; indeed, these resolute men must have been men used to such duty, men used to give and receive hard blows, and to act at all hazards; now we find that the mayor's force was not of this description, as a part of those who had been with him went away instead of acting. I now come to the mayor's going to the White Lion on the Sunday night. It appears that he had been up all the Saturday night, and that the White Lion is in the same street as the Guildhall; and as he could be easily found when sent for, it was no more than if he had taken some repose in another room; and you will say whether he was not justified in taking even more repose than it appears that he did, more especially as he had no more authority than any other magistrate of the city of Bristol. With respect to the protection of the gaol, you will consider whether the defendant had any sufficient force for that purpose. It has been said that he might have cut it off from the city by destroying a draw-bridge. But that is rather the act of a military man; and it could hardly be expected of a civil magistrate (who probably had never heard of cutting off a place in his life), that he should be competent upon a matter of military tactics or engineering. Another charge is, that the defendant did not protect the bishop's palace; and on this part of the case it appears that the defendant, accompanied by Mr. Serjeant Ludlow, went to it, but had not sufficient force to enable him to save it; and it appears also that the soldiers went away; but why they did do so we have no account; and the other force with

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the defendant is proved to have been perfectly inadequate. Another thing alleged against the defendant is, that the Doddington troop of horse arrived in consequence of a requisition from the defendant, and that he was not in such a situation as was necessary to receive them. Now it appears that accommodations had been provided for them, and that they left the city because a person at the door of Fisher's livery stables told them, that there was no accommodation for them there. As to who that person was, we have no account; but probably he was some person who did not wish this troop to act against the rioters. Another charge is, that being required to ride with the 14th Light Dragoons, the defendant would not do so. In my opinion he was not bound to do so. I do not think that a justice of the peace is bound to ride up and charge with the military. The military officer *may* act without any magistrate, but no prudent military man would do so, because his acting may be attended with the loss of life; but if a magistrate gives him an order to act, that is all that is required. If the law were otherwise, great inconvenience would ensue; for if it were necessary that the magistrate should ride with the troops when they charged, it would be necessary for him to ride with them every time that they did so; and it would be very injudicious in many cases, that a magistrate should charge with the military; more especially, if, like the defendant, he was the mayor of a town, and many persons from various quarters were likely to come to him, from time to time, for orders. Some evidence has been given, that the defendant has been seen on horseback; and from this you are asked to infer that he could ride: but to ride in a charge of cavalry, it is not enough for a man to be merely able to ride. To ride with the military you must ride as they do; and if a magistrate were to ride with the military, he would not only be in danger of being soon unhorsed, but he would also be, most probably, singled out by the rioters, and destroyed. Indeed, with respect to riding at the head of the troops,

even military commanders do not do that on all occasions: they only do so at particular times, and under particular circumstances; and I see no reason why a magistrate should do it. Another ground of complaint against the defendant is, that he did not attend to the fire-arms that were in the town, in the gunsmiths' shops; and it appears that when one gentleman put a question on this subject, he was led to believe, from the answer he received, that no directions had been given respecting them. However, you will have to say, whether it was not prudent to conceal the state of the arms, as, in point of fact, early on the Sunday, the magistrates had caused all the locks to be taken off the fire-arms; and, besides, I am not aware that a magistrate is guilty of criminal neglect, if he does not give orders respecting the arms in the gunsmiths' shops; all that he is bound to do, is to give the people reasonable warning to come out and assist him in quelling the riot, and to make the best use of them when they are assembled. Some question has been made as to the personal conduct of the mayor. It is charged, that he escaped from the Mansion-house over some leads on the Sunday. Now it appears by the testimony of Major Mackworth, that the life of the defendant was in danger; and that, though he was told so, he was unwilling to leave the Mansion-house. Indeed, he seems to have had the same feeling as the captain of a ship at a time of shipwreck, that is, that he will be the last man to leave it: however, Major Mackworth, considering that the life of the defendant was in danger, again urged him to depart, and he left, and was advised to go to Clifton; but he refused to leave the city, and went to the house of Mr. Grainger, where it is proved that several persons knew that he was. With respect to the personal courage of the defendant, Major Mackworth says, that he never saw a man more cool and collected in his life, and that too at a time when he considered the life of the defendant to be in danger: indeed, the defendant appears to have displayed great personal cour-

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age. He was placed in a most unfortunate situation—he had no military force who would act—there was a feeling against the corporation—and no disposition to quell the mob. Another charge is, that the defendant did not endeavour to preserve Queen's-square; however, that seems to have been a very hopeless case, as it would have required a very strong force to have put down the riot that existed there. It was no part of the duty of the defendant to hire men to put down the riots; his duty was only to collect those who would come upon reasonable warning. It appears that, on the arrival of Major Beckwith, of the 14th Light Dragoons, he found the defendant and other magistrates assembled, and that he asked, that some of them would go out with him; but that they refused. He says, "I put the question to each individually, and one said, that it would make him unpopular, and he feared his shipping might be burnt; another said, that he feared that his property would be destroyed; and they all said, they could not ride: and, on some gentleman saying that Alderman Hilhouse could ride, Alderman Hilhouse said, that he had not been on a horse for eighteen years, and that he would hold any one responsible who would venture to say he could ride." Still it was no part of a magistrate's duty to ride with the troops; and it is proved that the defendant signed an order, giving Major Beckwith authority to act, and you will say whether he was, on that occasion, guilty of a neglect of his duty. The charge in this case is very general and indefinite; and you will consider whether the defendant took the steps prescribed by law to collect a force, and whether he used that force as he ought; you will consider whether there was in him a criminal neglect of duty; and if you think that there was, you will find the defendant guilty; but if you think there was not, you will acquit him. I will read over the evidence, if you wish it; and should either of my learned brothers think it necessary to add any thing to my remarks, they have the right of so doing if they think proper.

Mr. Justice J. PARKE.—I do not think it necessary to add any thing.

Mr. Justice TAUNTON.—Nor do I.

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Verdict—Not Guilty. The Jury handed in a written paper in the following terms:—
 “We unanimously find Charles Pinney, the late Mayor of Bristol, not guilty of the misdemeanors wherewith he is charged. We are of opinion, circumstanced as he was; menaced and opposed by an infuriated and reckless mob; unsupported by any sufficient force, civil or military; deserted in those quarters where he might reasonably have expected assistance; that the late Mayor of Bristol acted according to the best of his judgment, with zeal and personal courage” (a).

Denman, A. G., Horne, S. G., Wilde and Coleridge, Serjts., Shepherd, and Wightman, for the prosecution.

Sir J. Scarlett, Campbell, Ludlow, Serjt., and Follett, for the defendant.

[Attornies—*Maule & Bouchier, and Jennings & Bolton.*]

The Foreman of the Special Jury (Captain Gardiner) asked the Court to order that the expenses of the Jury might be paid, as they had all come from Berkshire, and had been in attendance eight days.

Mr. Justice LITTLEDALE (having conferred with Mr. Justice J. PARKE, and Mr. Justice TAUNTON).—The Court have no power to make such an order.

(a) We are much indebted to the learned gentlemen engaged in this case, and also to Mr. Deal-try, for the assistance and information they have kindly afforded us.

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The Solicitor to the Treasury paid each of the Special Jurors one guinea.

There were other similar informations, against other magistrates of Bristol, which were not tried. The Special Jurors, who had been summoned to try the information which stood next in order, applied for their expenses, stating that they had been in attendance during the whole of the trial of Mr. Pinney, expecting to be called. They, however, were not paid any thing.

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A magistrate may assemble all the King's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect.

(a) We believe that there is no report of the trial of Mr. Kennett contained either in the State Trials or in any law-book. But, in Doug. Rep. 436, (n. 4), it is said—"the mischief the rioters did was from a persuasion, confirmed by example,

that the troops did not dare to act. Brackley Kennett, the Lord Mayor of London, was prosecuted by information, and, upon a full trial, convicted of a breach of duty, because he had not ordered the troops to quell the rioters by force."

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of Mary Crooke, there situate and being; and did also then and there, unlawfully, riotously, and tumultuously injure and destroy the household furniture and effects of divers quiet and peaceable subjects of our said Lord the King, whose names are at present unknown to the said Attorney-General, and commit and perpetrate other outrages and enormities; and the said Attorney-General of our said Lord the King, for our said Lord the King, giveth the Court here to understand and be informed, that Brackley Kennett, late of London, aforesaid, Esquire, at the time of the said unlawful, riotous, and tumultuous assembly, to wit, on the said fourth day of June, in the twentieth year aforesaid, and before and afterwards, was Mayor of the City of London aforesaid, and also one of the keepers of the peace and justices of our said Lord the King assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said City of London, (that is to say, at London aforesaid, in the parish and ward aforesaid,) and that the said Brackley Kennett being such Mayor and Justice of the Peace as aforesaid, well knew of, and was personally present at the time and place of, the said unlawful, riotous, and tumultuous assembly, and whilst the said persons, so unlawfully, riotously, and tumultuously assembled, were committing and perpetrating the aforesaid felony, injuries, outrages, and enormities, to wit, on the said fourth day of June, in the twentieth year aforesaid, at the said parish of Saint Giles without Cripplegate, in the ward aforesaid, in London aforesaid: And it was then and there the duty of the said Brackley Kennett, as such Mayor and Justice of the Peace as aforesaid, for the dispersing of the persons so unlawfully, riotously, and tumultuously assembled as aforesaid, and the suppressing and putting an end to the said unlawful, riotous, and tumultuous assembly, to have then and there made, or caused to be made, proclamation in the manner prescribed and directed in and by an act of Parliament, made in the Parliament of the Lord George the First, late King of Great Britain, &c., at a session thereof holden at Westminster, in the county of Middlesex, in the first year of his reign, intituled 'An Act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters.' And the said Attorney-General of our said Lord the King, for our said Lord the King, giveth the Court here further to understand and be informed, that the said Brackley Kennett, being such Mayor and Justice of the Peace as aforesaid, and well knowing of the said unlawful and tumultuous assembly, and being so present as aforesaid, but disregarding his duty as such Mayor and Justice of the Peace as aforesaid, and the directions contained in the said act of Parliament for the suppressing of tumults and riots, did not, at any time during the said unlawful, riotous, and tumultuous assembly, make or cause to be

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made proclamation in the manner prescribed and directed by the said act of Parliament (a), but then and there, to wit, on the said fourth day of June, in the twentieth year aforesaid, at the said parish of Saint Giles without Cripplegate, in the ward aforesaid, in London aforesaid, wilfully, obstinately, and contemptuously neglected, refused, and omitted to make or cause to be made proclamation in the manner prescribed and directed by the said act of Parliament, and thereby then and there unlawfully permitted and suffered the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid, to be and continue there unlawfully, riotously, and tumultuously assembled as aforesaid, for divers, to wit, four hours, doing, committing, and perpetrating the said felony, injuries, outrages, and enormities, contrary to the duty of him the said Brackley Kennett, as such Mayor and Justice of the Peace as aforesaid, in contempt of our said Lord the King and his laws," &c.

The *second* and *third* counts were nearly similar, except that they omitted such part of the charges in the first count as related to demolishing houses or furniture. The *fourth* count stated a riot to have occurred in the defendant's presence, and that he, disregarding his duty, did not make the proclamation, but refused, and neglected, and omitted so to do.

The *fifth* count stated the riot, and that the defendant was a Justice of the Peace and present at it, and then went on—"And that the said Brackley Kennett, being such Justice of the Peace as aforesaid, and disregarding the duty of his said office, did not apprehend or restrain the said persons so unlawfully, riotously, and tumultuously assembled as last aforesaid, or any of them, or endeavour so to do, or use any means or endeavours whatsoever to suppress and put an end to the said unlawful, riotous, and tumultuous assembly, or execute or endeavour to execute any of the powers and authorities by the laws of this realm vested in the said Brackley Kennett as such Justice of the Peace as last aforesaid in that behalf; but the said Brackley Kennett then and there unlawfully, wilfully, and contemptuously refused, neglected, and omitted to apprehend or restrain the said rioters, or any of them, or endeavour so to do, or to use any means or endeavours whatsoever to suppress and put an end to the said unlawful, riotous, and tumultuous assembly, or execute, or endeavour to execute, any of the powers and authorities by the laws of this realm vested in him, the said Brackley Kennett, as Justice of the Peace as aforesaid in that behalf; and then and there unlawfully permitted and suffered the said persons, so unlawfully, riotously, and tumultuously assembled, to be and continue there so unlawfully, riotously, and tumultuously assembled, for a long space of time, to wit, for the space of

(a) See *ante*, Vol. 4, p. 442, where the sections of this statute are set forth.

four hours, contrary to the duty of his said office of Justice of the Peace as aforesaid, in contempt of our said Lord the King and his laws," &c.

The *sixth* count was nearly similar to the fifth count, except that it stated the riot in rather more general terms. Plea—Not Guilty.

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Mr. *Attorney-General* stated that the powers given by the laws to Magistrates were admirably calculated to check mischiefs of the nature and tendency of those which were perpetrated in the Metropolis in June last; that the Riot Act points out their duty in terms so clear that it is impossible for them to mistake. They are directed to resort to the place where the tumult arises, and to make proclamation to disperse. The act (he said) was made on great consideration, and was more universally known than perhaps any act in the statute-book. He stated that the riots in June began on Friday the 3rd; on which day the chapels of the Sardinian and Bavarian ambassadors were pulled down by people not many in number, thirteen of whom were apprehended; then they assembled in Moorfields, but were for that time dispersed. The next day, about five o'clock, a few more assembled there, and the Lord Mayor was applied to to suppress the riots. He said he would go there; upon which the person who applied returned, and waited there some time, and the mob destroyed the chapel; he thereupon went again to the Lord Mayor; and Mr. Malo, whose house was threatened, came and desired assistance. The Lord Mayor asked him if he was a Roman Catholic, he said "Yes;" to which the Lord Mayor answered, "I thought so." In the evening he (the defendant) marched with a detachment of 30 Guards to Moorfields, and found the rabble destroying the chapel and burning the furniture. He entreated them to be quiet, they increased the tumult and pelted the soldiers. Mr. Kennett said—"Pray be quiet; don't do more mischief than is necessary." He was desired repeatedly by the officers to read the Riot Act, which he neglected. He said—"Let them proceed;" and on being applied to by Lord Beauchamp to act, he said they were only destroying the houses of people to whom they had conceived a dislike. The defendant was looking on, but took no steps to suppress the outrage. Mr. *Attorney-General* said it was impossible the Alderman could make any defence, for that his conduct did not admit of apology or extenuation; and he concluded with declaring it was his firm belief, that if the Lord Mayor had exerted himself in the infancy of the business, assisted as he was by 90 soldiers, the dreadful consequences which followed would not have ensued.

Mr. Dermot deposed that he knew the defendant Mr. Alderman Kennett; that he was Lord Mayor last year; that on Sunday, the 4th of June, the witness went to him at the request of some inhabitants of St. Giles's

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parish, who informed him that there was a mob gathering in Moorfields, threatening the destruction of a Roman Catholic Chapel. He went to the Mansion House and saw the Lord Mayor, and told him he was informed that there was going to be a riot in Moorfields. On his being pressed, the Lord Mayor said, he would come directly. When he returned, he saw a few boys doing mischief, and that there were many people there. He entreated them to be quiet. He staid some time, and the Lord Mayor did not come; he then went back, and found the Aldermen Clark and Peckham at the Mansion House; and Mr. Alderman Clark said, he would venture, with some constables, to drive them away; he withdrew into another room; Mr. Malo and another gentleman came in, and Mr. Kennett came to them. Mr. Malo said he wanted troops to protect his house, for the rioters were going to pull it down. The defendant asked him if he was a Papist? Malo said he was; upon which the Lord Mayor turned round and said—"I thought so." That there was another gentleman there, who said—"My Lord, I am a Protestant;" and the Mayor went into another room. The witness's first application was about five o'clock, the second about six o'clock. On his cross-examination by Mr. *Erskine*, he said, that he was a native of this country; that when he went the first time to the Mansion House, it was between four and five o'clock. The Lord Mayor had done dinner. The witness told him that the mob threatened to pull down the Roman Catholic chapel; and he said, he would be there immediately.

Mr Joseph Gates, one of the City Marshals, deposed that he was in Moorfields, and quelled the rioters assembled on Saturday night; that he received orders from the Lord Mayor to be in the way on Sunday; he went to Moorfields before three o'clock on Sunday in the afternoon; that there were a few boys about, but no appearance of a riot; that he went away satisfied that there would be none; about five o'clock he returned there, and found them throwing out the furniture; that he sent for constables, but few came; that he went to the Mansion House between five and six o'clock; he saw the defendant, who was angry he had been out of the way; the Lord Mayor sent him with a letter to the officer commanding at the Tower. Lord Spencer Hamilton, the officer, sent word he would send troops as soon as possible. Mr. Kennett and the Aldermen got their servants and flambeaux ready to attend the troops; this was between seven and eight o'clock. The troops were so long in coming, that the Lord Mayor sent again to the Tower; and about nine o'clock the troops came, and they went to Moorfields. The beat of the drum made them desist a little while, and the witness took several into custody. The constables hid their staves, for fear of being known, and the prisoners were released. The mob began again, and more troops were sent for; that he heard the Lord Mayor and several more gentle-

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men say they thought the force was not sufficient; that the witness thought then, and thinks now, the force was sufficient, for if they had fired, no doubt the mob would have run away; that more troops came; and the mob were then tired, and warming themselves round the fire; that the Lord Mayor staid there till one o'clock, but gave no orders; that the Lord Beauchamp desired the Lord Mayor to use some means to suppress the mob; he did not use any; and Lord Beauchamp told him his conduct should be reported; that a second party of soldiers came before one o'clock, and that the third party was sent for and came. One of the officers said, (and he believed to the Lord Mayor,) that they were sent for to be made fools of, and asked what they were to do, and said, that some of the soldiers had been pelted, and were angry. The witness said that the force at last was about ninety; he had no doubt but the force was sufficient.

Upon his cross-examination by Mr. Bond, he said that his particular duty as one of the High Constables was to summon constables; that he was at the Mansion House on the 3rd of June; that the Lord Mayor informed him he had received a letter from the other end of the town, importing danger, and desired him to be in the way; and when he went to the Tower, he found the officer at a coffee-house in Thames street; that he never thought at Moorfields there would be any danger in reading the Riot Act; that several of the Lord Mayor's company dissuaded him from reading it, thinking the troops too few; that he believed no man wished more to put an end to the riots than Mr. Kennett did; that he went among them and endeavoured to persuade them to desist, and told them, if they did not, he must use the force in his hands. The witness said, that he saw no violence offered to the Mayor; and that if the Lord Mayor had ordered the soldiers to fire, he might have killed some of the mob out of the city [this produced a very hearty laugh]; that there were many innocent spectators, but the rioters might have been fired on without hurting them.

Dorothy Halsinbrooke deposed, that in June she was in Moorfields all the time of the riot, and saw a person by the title of "My Lord" addressed by several persons, and heard him say, "Do no more mischief than is needful;" the bystanders damned him and said—"Was any mischief necessary to be done?" Upon her cross-examination, she said she never saw the Lord Mayor, and did not know him; that she did not know that there was any other Lord there; and that she believed the person addressed was the defendant.

William Easton, an officer of the Sun Fire Office, deposed that he was with his engine at Moorfields on the 4th of June, and heard the commanding officer ask the Lord Mayor for orders; that he desired him to be quiet and let them alone; this was about eight or nine o'clock at

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night, and the mob were then pulling down the chapel. Upon his cross-examination he said, that he knew the Lord Mayor well, having rowed him many score miles.

Mr. Dempsey deposed, that he was in Moorfields on the Sunday, and saw the mob pulling down two houses, and saw the Lord Mayor there about nine or ten o'clock in the evening, and saw soldiers and officers, and heard an officer ask him leave to do his duty; and that he repeated his request, and said he would be accountable for his conduct and the consequences; he did not hear the answer, and he went away soon after; and that the soldiers by not acting encouraged the mob.

Mr. Gascoign, ensign in the Guards, deposed, that he went to Moorfields with the second detachment between ten and eleven o'clock at night; that he applied to the Lord Mayor, and told him he had orders to obey him; he said he was glad he was arrived, and desired him to form a half-circle before the house; that he applied again to him for orders, and he heard the Lord Mayor threaten the mob to read the Riot Act, but it was not read. The Lord Mayor remained till the mob dispersed. There was no mob with arms, and there were many women and children; the force was certainly sufficient, if they had received orders to use military force, but they must have shed much innocent blood; they might have kept them off with their bayonets, and the rioters might have been apprehended. The soldiers were very ready to have acted, and were vexed they did not. The Lord Mayor gave no satisfactory answer to his applications, but said they had done all they intended, and would do no more mischief. Upon his cross-examination, he said, that the number of persons who were actually mischievous was small, but there were many backing them and pelting. The Lord Mayor was much confused, and the people about him as much so; he seemed desirous of doing his duty, if he had known how; he asked several people what to do. The witness said, that if the Lord Mayor had read the Riot Act he would have been pelted, but could not have been attacked by the mob, he being surrounded by the soldiers. Being questioned by Mr. *Dunning*, the witness said, he did not think the Lord Mayor had done his duty; the riot might have been suppressed by the bayonet without firing; but that charging with the bayonet would have been as dangerous to the women and children by-standers as the discharge of musketry, for that men charging in the line could not stop themselves; but he said, no doubt but that some of the rioters might have been apprehended. The witness told the defendant he had a sufficient force, and several persons called upon him to act.

James Hubber, a sergeant in the Guards, deposed, that he went with a party to the Mansion House, and from thence to Moorfields; that the mob were then pulling down the chapel; the Lord Mayor desired them repeatedly to disperse; but the witness never heard any orders given, nor

the Riot Act read; after the second party came, which was about eleven o'clock, they might have dispersed the mob if they had been ordered; that they formed a ring for the Lord Mayor, until he retired into a house.

George Gurry, another sergeant, deposed, that he went with the second party of Guards to Moorfields, about half-past nine o'clock, and staid till half-past three o'clock; that he did not hear any orders given by the Lord Mayor, nor any application made to him for orders; that the soldiers did nothing, and were of no use; that they could have taken the rioters; and that the soldiers had some stones and brick-bats thrown at them.

Sergeant Hyde deposed, that he went to Moorfields with the last party of Guards; the mob were then pulling down the houses and making a bonfire; that the soldiers could have apprehended them all if they had been ordered, but they did no good there.

Lord Beauchamp deposed, that, between nine and ten o'clock on the Sunday evening, the 4th of June last, he heard there was a riot in Moorfields; that he went there, and, at the end of the street where the mischief was doing, there were a number of persons assembled, not of rabble, but of well-dressed citizens, returning to town from their country walks; that he saw an engine and some firemen in an adjacent street; that the mob were then making a large fire, and destroying the chapel; the firemen were ready to extinguish the fire, but said they could not get up, unless the soldiers would make way for them. Upon his lordship's speaking to one of the serjeants, he said they wanted orders. Mr. Reed begged Lord Beauchamp, if he had any influence with the Lord Mayor, to use it, that something might be done. The witness went to the defendant, and asked if his lordship's person was known to him? He said, yes; upon which Lord Beauchamp said to him, "This might be prevented by some means; it is your duty to do something." (His lordship begged it might be understood that he did not recommend firing, because he did not think it necessary.) The Lord Mayor said—"The whole mischief seems to be the destruction of some property of persons against whom the mob have an antipathy or dislike." That the witness (Lord B.) then told him, that the House of Commons was to meet on the Tuesday following, when he should think it his duty to lay before the public what he had observed of his conduct or misconduct. The Lord Mayor made no answer, but left the witness. The by-standers, who were many, were decent people, and expressed much concern at what passed: the rioters were few in number. "I thought," said his Lordship, "the force fully sufficient, without any firing; the mischief might have been prevented without any bloodshed. I do not think there was any danger in reading the Riot Act. There were not any arms nor even sticks among the mob; those who were active seemed acting as if employed by the owner of the

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house." Upon his cross-examination his Lordship said, he did not think the Riot Act necessary to be read, because the rioters were then in actual perpetration of acts of felony.

John Cole deposed, that on the 4th of June he was in Moorfields; that he saw Mr. Alderman Kennett there, and applied to him to form his men; he seemed very placid and composed, and said—"I will, as soon as I have a reinforcement." The witness thought the mischief might have been suppressed easily; nothing was done for that purpose; but the rioters continued in doing their business without interruption. The witness added—"If I had dropt from the clouds, and had known nothing of the precedent business, or the laws of this country, I should have thought that the rioters were executing the sentence of the law, by razing the house of some state criminal, and that the Lord Mayor and soldiery were attending to protect them in the business."

The evidence for the prosecution being closed—

Mr. *Erskine* addressed the Jury in an animated and ingenious speech, in which it is impossible to follow him and do it ample justice. He observed that, among the many things which the Jury had heard to surprise them, it could not fail to surprise them, to see him, a young and inexperienced man, come into the city to defend its chief magistrate, on a charge of so high a misdemeanor. It would have been (he said) more safe for the defendant, and more for the honour of the Crown, to have left him in the possession of that great and experienced lawyer (Mr. *Dunning*), who, upon this occasion, was added to the officers of the Crown, as an instrument to prosecute the defendant. It was not for the honour of the Crown, that did not design to give that great man any of its ordinary honours, which his abilities so well merit, to defraud an individual upon the present occasion of those abilities, (which, Mr. *Erskine* said, he could never attain); and that at a time, too, when most of the bar were absent on the circuits. Mr. *Erskine* said, he felt some consolation, however, in his weakness, that it entitled him to claim an extraordinary share of attention from the Jury; and he felt more at home than he expected he should have felt, since the prosecutors seemed to be arraigning his client before a court martial, or trying him for want of courage in a court of honour. A charge, which he did not feel himself called upon to meet, as the charge in the information was, that of a criminal abuse of magistracy. He condemned the conduct of the Crown in selecting the defendant as the object of their vindictive proceedings; since the magistrates of Westminster had been more culpable in not opposing that violence, which came from them into the city; and the officers of the Crown had themselves declared in Parliament, on a late occasion, that it was not the police of Westminster that was defective, but the execu-

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tion of that police. He stated that the Riot Act was made upon the elevation of the family of Hanover to the throne, to prevent the disorders that might be occasioned by those who were enemies to that accession. It was not decent, he said, to speak in terms of disapprobation of a law which continued on the statute-book unrepealed; but the present, he begged it might be remembered, was the first occasion upon which a magistrate had been prosecuted under the act of 1 Geo. 1. In answer to what had been said by Mr. *Attorney-General*, that the act was universally understood, he (Mr. *Erskine*) declared he did not know any subject on which so universal an ignorance had prevailed. Men of eminence in the profession of the law had entertained doubts upon the legality of calling in the military upon tumults of the sort which formed the subject of discussion; for, in times of tranquillity and order, men do not examine into their powers to suppress or prevent disorders which they do not foresee. He observed that men did not want laws to inform them, that, when others are doing acts of felony, every man is bound, by the laws of God and of civil society, to oppose force to suppress the violence, and that without orders; and the reading of the Riot Act in such a case is unnecessary: But that this was not so understood was manifest, from the total ignorance on the subject in the most august assembly in the kingdom, where men were planet-struck on hearing the doctrine laid down by the noble and learned Lord who was then trying the cause. Mr. *Erskine* said, that, antecedent to the administration of the noble lord, the hunting a justice of the peace was fine fun for an Attorney-General, and many honest well-meaning men had been disgraced for the errors of their heads. This was an abuse which Lord *Mansfield* had corrected; and whenever an application was made to the Court of King's Bench for leave to file an information against a magistrate, (a step which every body but an Attorney-General was obliged to take), the Court protected him; and, if the heart was right, would not suffer him to be harassed for errors merely of judgment. For this position he cited two cases from Sir James Burrow (a), and he contended, that on this principle, in which he should be confirmed from the Bench, the Jury must, if they should find a verdict of guilty, be convinced that his client had acted *mala fide*, or, in the words of the information, wilfully, obstinately, and perversely. Mr. *Erskine*

(a) *Rex v. Young*, 1 Burr. 556, and *Rex v. Palmer*, 2 Burr. 1162. In these cases it was held, that where a justice of the peace has acted illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any

bad view or ill intention, the Court will not grant a criminal information against him, but will leave the party complaining to the ordinary legal remedy, or method of prosecution by action, or by indictment.

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observed, that cowards were always brave when danger was over; that he was not addressing the Jury in the case of an ordinary riot; a greater danger never before visited any country. The only crimes the Lord Mayor had been guilty of were those of shewing too great fear and exercising too much humanity. He reminded the learned advocates for the Crown, that they had themselves partaken of the universal panic, when imprisoned and besieged in the House of Commons. Under all these circumstances, he contended that it was too much to impute criminal neglect to a magistrate who had the inclination to do his duty, but who was distracted, and threatened with indictments at the Old Bailey, and had the horrors of massacre and murder urged to deter him from using the military. A gentleman, who knew something of the present prosecution, had alarmed him with the bloody massacre in Saint George's Fields, where an old apple woman had been shot by accident; a subject on which volumes of paper had been wasted; a gentleman, against whom he wondered the *Attorney-General* had not directed his vengeance, as it would have been diversion to have hunted Mr. Wilkes, a gentleman who, when called upon to co-operate for preserving the peace of the city, said he must look to his own ward, which he protected so well that the prisons of Newgate and the Fleet, and Mr. Langdale's house were destroyed in it. Mr. *Erskine* professed a great respect for Mr. Wilkes; but said, he believed he had more experience in raising than dispersing multitudes. Mr. *Erskine* enforced his arguments respecting the *quo animo* of the defendant, and declared, that, if he was defending his own case, he would rest his defence on the evidence produced by the prosecutor; but, in a case of such importance, he should call some witnesses, of the most respectable character, to put the subject out of all doubt.

The Reverend Dr. Kennett deposed, that, on the 4th of June, at half past two o'clock, he was at the Mansion House when the Mayor came in; he brought a notice from one of the Secretaries of State, informing him there was a suspicion of a riot within his jurisdiction, and recommending to him to use every legal method to suppress it; that the witness, by his desire, wrote to the commander of the Tower, to give him notice, and to desire that a force might be in readiness. That Aldermen Clark and Peckham came; they sent for the Riot Act. About five o'clock Mr. Malo came and informed him there was an alarm of a mob; the Mayor told him of the letter which was written, and promised his assistance; that the witness wrote a second letter, at about eight o'clock, to the commander of the Tower, informing him there was a riot, and requesting the attendance of his lordship and the military force, and informing him that he would be attended from the Mansion House by the Mayor and

two other Aldermen to the place of the riot. The officer wrote, that he should have a force detached, and soon after Lord Spencer Hamilton came without one. The troops did not come till half past nine. The witness pressed Lord Spencer Hamilton to make haste; he said, those things were not to be done in a minute, and that he could not spare more than thirty men, having forty thousand stand of arms in the Tower under his care. As soon as the thirty men came, the Lord Mayor, two Aldermen, and Sheriff Pugh, went away with them. The witness said, he never saw a man in greater anxiety than his father was in.

Lord Spencer Hamilton deposed, that, having received two letters from the late Lord Mayor, on the 4th of June, he went to the Mansion House, where the defendant and two Aldermen were waiting for the detachment; that the witness had told the defendant he thought thirty men too few for him to go with, and that he would send thirty more. Mr. Kennett said he would go as soon as they arrived; that he was impatient for them, and went immediately on their arrival; that he lost no time. The witness told him he should not want men, and sent him two other detachments.

Mr. Alderman Clark deposed, that in his attending the late Lord Mayor, pursuant to his summons, he found him very impatient for the arrival of the troops; when they came, they went together to the spot. The Lord Mayor exhorted the mob to depart, and threatened that if they did not he would use the military force. The witness was informed that one of the Mayor's footmen had been struck with a stone, which fractured his skull, and a very large stone hit his own hat. The firemen were afraid to act. The witness believed it was the intention and desire of Mr. Alderman Kennett to suppress the riot. The military could not have fired without destroying many innocent people.

Mr. Samuel Thorp, a common councilman, deposed, that he went to the Lord Mayor, who was with the Aldermen Clark and Peckham in an adjoining house, while the mob were destroying the chapel in Moorfields. The witness inquired if the Riot Act had been read, and found it had not; the reason assigned for not doing it was the expectation of a reinforcement. No magistrate in the room disapproved the Mayor's conduct, or recommended any other. The witness said, as it was Sunday evening, in the midst of summer, the flame had drawn together a number of holiday people, who would suffer if the Riot Act was read. Upon the arrival of the reinforcement at two o'clock, the officer said—"My lord, now we have a sufficient force." The Mayor did not answer. The witness told the Mayor he did not understand what the officer meant, for his lordship would be answerable for the mischief that might ensue; that Alderman Pugh had said they would do no mischief; and he should

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consider whether saving the remainder of the timber was worth involving many innocent people in the promiscuous carnage.

George Brown, Secretary to the Westminster Insurance Office, deposed, that he was at the riot in Moorfields, and was two or three times in the room with the Lord Mayor, and heard an officer of the Guards say—"My lord, we are now ready." His lordship's reply was—"I fancy they have done all the mischief they intend to do, and will disperse without doing more, or going to greater extremities." Upon the witness proposing afterwards to the officer to drive the mob out, he said—"Sir, we are not strong enough." Upon his cross-examination he said, he thought the number of soldiers sufficient to reduce the riot without bloodshed, and that he did prevail on many of the rioters to go home, by giving them money to drink.

The Aldermen Pugh and Peckham, and many others, attended, but Mr. *Erskine* declined calling more witnesses.

Mr. *Solicitor-General*, in reply, said, that there were very few facts in dispute; that the information was not founded on an abuse of magistracy, as stated by Mr. *Erskine*; but for making no use of the office entrusted to the defendant, and that he did no act of duty, and was therefore charged with gross neglect. No *mala fides* being necessary to support this information, there would be an end of the administration of justice if a magistrate could excuse himself by saying, "I was an egregious fool, and did not know my duty." He (the *Solicitor-General*) declared, that there were some circumstances in evidence which created a suspicion in his mind, that the defendant was not absolutely free from the diabolical and disgraceful spirit of persecution and fanaticism which disgraced that period.

Lord MANSFIELD then proceeded to state to the Jury that the case before them was an information which the Attorney-General, or the authority under which he acted, had thought fit to bring before them to decide. His Lordship then stated the terms of the information, and proceeded—"The common law and several statutes have invested justices of the peace with great powers to quell riots, because, if not suppressed, they tend to endanger the constitution of the country; and, as they may assemble all the King's subjects, it is clear they may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. It is well understood that magistrates may call in the military. It would be a strange doctrine, if, in an insurrection rising to rebellion, every subject had not a power to act, when they possess the power in a case of a mere breach of the peace. By the act of the 1st

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George the First, a particular direction is given to every justice for his conduct; he is required to read the act, and the consequences are explained. It is a step in *terrorem* and of gentleness; and is not made a necessary step, as he may instantly repel force by force. If the insurgents are not doing any act, the reading of the proclamation operates as notice. There never was a riot without by-standers, who go off on reading the act. The counsel for the defendant has done me the honour of attributing a doctrine respecting magistrates to me. Where any thing is in my discretion, I will never punish where the intent is good, and the magistrate has only mistaken the law; but that is only where it is in my discretion. In such a case, I always leave the party complaining to go before a grand jury; but that is not the case of the present information. This information does not charge any intent of favouring or conniving at the riots, but only a neglect of duty; and every neglect of duty depends upon circumstances. In this case the charge is proved. In law, to say, "I was afraid," is not an excuse for a magistrate; it must be a fear arising from danger, which is reduced to a maxim in law to be such danger as would affect a firm man. In this case the neglect, at first view, is proved. The witnesses have sworn that the defendant used none of the authorities vested in him by law; he did not read the proclamation, nor restrain or apprehend the rioters, or give orders to fire, or make any use of the military under his direction. But this does not exclude a defence. The defence here relied on is—"Tis true, I did not restrain or apprehend any rioters, nor use the military; but, under all the circumstances, this was not a neglect." It is *prima facie* the duty of a magistrate to read the act; but this duty depends on circumstances: he might be alone, and not able to do it. If he did what a firm and constant man would have done, he must be acquitted. If, rather than apprehend the rioters, his sole care was for himself, this is neglect. The sole question is, under all the circumstances of the case—Has the defendant laid before you the justification of a man of ordinary firmness?" His Lordship said, in a case of this sort, he would purposely avoid drawing the attention of the Jury to material parts of the evidence, which might intimate an opinion of his own. He then stated very clearly and impartially the evidence on both sides.

The Jury went out of Court before five o'clock, and his Lordship went away about six.

The Jury, about seven o'clock, went to his Lordship's house, and expressed a wish to deliver a verdict, finding the neglect, but acquitting of the criminal part of the charge; but his Lordship having informed them that the verdict must be general, guilty or not guilty, and that it would

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be in the power of the Court to receive any favourable circumstance in exculpation of the defendant's conduct, before any judgment was given against him. The verdict was brought in—

Guilty (*a*).

Mr. Kennett's counsel were Mr. *Erskine* and Mr. *Bond*; his attorney, Mr. *Woodhouse*, solicitor of Bedlam and Bridewell.

There was another information against Mr. Kennett, for discharging six prisoners out of the Poultry Compter (*b*); but it appearing that the defendant had acted in that instance in conjunction with seven aldermen, and other circumstances appearing in the defendant's favour, which had not before come to Mr. Attorney-General's knowledge, he was pleased to drop that prosecution; and the Special Jury were discharged.

(*a*) No sentence was ever passed in this case, as Mr. Kennett died soon after the trial.

(*b*) This information charged that John Lloyd, William Beard, Henry Jones, Solomon M'Daniel, John Hughes, and Thomas Dunkley, and divers others, to the number of five hundred, were riotously assembled, attempting to break open a certain prison, called the Poultry Compter; that Jos. Gates, then being a constable, apprehended them, and delivered them, the said J. L., W. B., H. J., S. M., J. H., and T. D, into the custody of Henry West, the keeper of the said

prison, to be safely kept, it not then being a fit time to carry them before a justice of the peace for examination; and that the defendant, being one of the Justices of the city of London, and intending to obstruct and hinder the due course of justice, did order that the said J. L., W. B., H. J., S. M., J. H., and T. D., should be brought before him, and did order that they should be discharged, without any examination, and in the absence of, and without notice to, Joseph Gates; and that they were discharged and set at liberty.

OXFORD SPRING CIRCUIT.

1832.

BEFORE MR. JUSTICE LITTLEDALE, AND MR. JUSTICE
TAUNTON.

WORCESTER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.



REX v. JOHN COX.

1832.

March 6th.

INDICTMENT for carnally knowing and abusing Sarah Blakeway, a child under the age of ten years.

It appeared that the prisoner, who was a man upwards of sixty years of age, had induced the child to go up stairs with him by promising to give her an apple; and that a woman who went up stairs soon after found a mark as if some one had lain on a bed which was there. It was also proved that the person of the child exhibited marks of violence; and that both she and the prisoner had gonorrhoea.

Where, on a charge of rape, the Jury found that there had been penetration, but that there had been no emission from the prisoner—The 15 Judges held that the prisoner was rightly convicted of the rape.

The Jury found that there had been penetration, but that there had been no emission from the prisoner.

Mr. Justice LITTLEDALE passed sentence on the prisoner,

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and reserved the case for the consideration of the fifteen Judges, who held the conviction right (a).

F. V. Lee, for the prosecution.

Godson, for the prisoner.

(a) For the report of this case we are indebted to the learned counsel engaged in it. This case overrules the decision in the case of *Rex v. Russell*, 2M. & M. 122. But

see the cases of *Rex v. Jennings*, ante, Vol. 4, p. 249; and *Rex v. Wedge*, infra, and *Rex v. Gammon*, post, p. 321.

STAFFORD ASSIZES.

(*Crown side.*)

BEFORE MR. JUSTICE TAUNTON.

March 12th.

REX v. JAMES WEDGE.

On an indictment for carnally knowing and abusing a female child under ten years of age, the best evidence of the age of the child ought to be produced. Where an offence of this kind was committed on the 5th of February, 1832, and the child's father

INDICTMENT for carnally knowing and abusing Mary Underhill, a child under the age of ten years.

The offence was alleged to have been committed on the 5th of February, 1832. To prove the child under ten years old at the time of the alleged offence, the father of the child was called; he stated, that he was in the habit of going out with boats for a week or a fortnight at a time; and that, in the month of February, 1822, he went from home for a few days, and that his wife had not then been confined; and that, on his return, on the 9th of

proved, that, on his return after an absence from home of a few days, on the 9th of Feb., 1822, he found that the child had been born, and was told by her grandmother that she had been born the day before; and the register of baptisms shewed that the child had been baptized on the 9th of Feb., 1822: it was held not sufficient to prove that the child was under ten years old.

February, 1822, he found that this child had been born; and he was told by his wife's mother, that it had been born the day before. An examined copy of the register of the baptism of the child was put in; and from that it appeared that the child had been baptized on the 9th of February, 1822. The mother of the child was dead, but the grandmother was living at the time of the trial.

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Mr. Justice TAUNTON (having conferred with Mr. Justice LITLEDALE).—My learned brother concurs with me in thinking that this evidence is not sufficient. The whole amount of the evidence to prove the time of the child's birth is the declaration of the grandmother to the father. The father was from home at the time of the birth, and the mother is dead; but still the grandmother might have been called. As this is a matter of so much importance in a case of this kind, we think that the best evidence ought to be adduced.

Verdict—Not guilty.

Corbet for the prosecution.

See the case of *Rex v. Cox*, ante, p. 297; and *Rex v. Gammon*, post, p. 321.

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 REX v. HILDITCH and Others.

May 13th.

INDICTMENT for a robbery. The case for the prosecution had been closed, and the defence of the prisoners was an *alibi*, viz. that they were at a public-house, at a considerable distance from the place at which the robbery was committed.

Any evidence that is a confirmation of the original case, cannot be given as evidence in reply; and the only evidence that can be given in reply

is that which goes to cut down the defence, without being any confirmation of the original case.

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W. J. Alexander, for the prosecution, wished to call a witness in reply, to prove, that he saw all the prisoners near the spot at which the robbery was committed; and that, therefore, they could not have been at the public-house.

Mr. Justice TAUNTON.—Proving that the parties were near the place at which the offence was committed is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply: and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.

The evidence was rejected.

W. J. Alexander, for the prosecution.

F. V. Lee, for the prisoner.

See the case of *Rex v. Stimpson*, ante, Vol. 2, p. 415.

SHREWSBURY ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

March 16th.

REX v. BOOTYMAN.

Where a party is charged with embezzlement, the Judge, before the indictment is found, will

EMBEZZLEMENT.—Before the indictment was found by the Grand Jury, the prisoner having been held to bail—

order the prosecutor to furnish the prisoner with a particular of the charges, if the prisoner make an affidavit that he does not know what the charges are, and that he has applied to the prosecutor for a particular, and it has been refused.

Curwood (with whom was *F. V. Lee*) applied to the learned Judge to grant an order calling on the prosecutor to deliver a particular of the charges.

This was moved on an affidavit stating that the prisoner, who had been farming bailiff to the prosecutor, did not know what charges of embezzlement were intended to be brought against him; and that he had applied for a particular, which had been refused. The case of *Rex v. Hodgson (a)*, and the authorities there referred to, were cited in support of the motion.

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 BOOTYMAN.

Bather and *Macleane* opposed the application; but—

Mr. Justice LITTLEDALE granted an order for a particular; which was delivered to the prisoner's attorney accordingly.

The prisoner was afterwards tried and convicted.

Bather and *Macleane*, for the prosecution.

Curwood and *F. V. Lee*, for the prisoner.

[Attornies—*Nock*, and *Asterley*.]

(a) *Ante*, Vol. 3, p. 422.

REX v. EDWIN TAYLOR.

March 17th.

MANS LAUGHTER.—After the trial, *Bather*, who was for the prosecution, stated, that the coroner had ordered the body of the deceased to be opened, and had ordered the churchwardens to pay the surgeon's fee for it; but a magistrate having told the churchwardens not to pay it, Sir *J. Scarlett*, whose opinion had been taken, had advised that the churchwarden could not be compelled to pay it; and he,

On the trial of an indictment for manslaughter, the surgeon will only be allowed for his attendance on the trial, and not for his fee for opening the body by order of the coroner.

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REX
v.
TAYLOR.

therefore, applied to the learned Judge to order it to be paid by the county, as a part of the expenses of the prosecution.

Mr. *Bellamy* (the clerk of assize).—Where the examination in a case of felony is before a magistrate, he grants a certificate for the costs before him; but a coroner has no power to grant any such certificate.

Mr. Justice LITTLEDALE.—I can only allow the surgeon the usual costs of his attendance here.



MONMOUTH LENT ASSIZES, 1832.—Cor. LITTLEDALE, J.



March 27th.

REX v. REES.

The Judge, on a trial for murder, has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest.

MURDER. After the trial, *Watson*, for the prosecution, applied to the learned Judge to order the costs of the witnesses for their attendance at the coroner's inquest.

Mr. Justice LITTLEDALE.—I have no power to make such an order.

See the stat. 7 Geo. 4, c. 64, s. 22, set forth Carr. Supp. p. 106.

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MONMOUTH ASSIZES.

BEFORE MR. JUSTICE TAUNTON.

HARGEST v. FOTHERGILL, Esq.

March 28th.

TRESPASS against the late Sheriff of Monmouthshire for taking the plaintiff's goods.

To connect the Sheriff with the seizure, the officer was called on his subpoena, but he did not appear. It was then proposed to give other evidence of the warrant.

The cause came on for trial on the morning of Wednesday, March 28th; and on the evening of Monday the 26th, the plaintiff's attorney had served Mr. Phillips, the under-sheriff of the defendant, and who was also attorney for the defendant in this action, with a notice to produce a book kept in the under-sheriff's office at Newport, containing an entry of the warrant from the under-sheriff to the officer. The notice was served on Mr. Phillips at Monmouth, he being at that place attending the Assizes, and his office being at Newport, which is nineteen miles from Monmouth.

A cause came on to be tried at the Assizes on a Wednesday morning; on the previous Monday evening, the defendant's attorney being at the assize town, was served with a notice to produce a book, which would probably be at his office, which was nineteen miles from the assize town: —*Held*, that this service was too late.

Maule, for the defendant, objected that this notice was served too late.

Curwood and *Carrington*, for the plaintiff.—The notice was served in ample time for the book to have been obtained from Newport. There was an entire day for any messenger to have gone and returned with it.

Mr. Justice TAUNTON.—I think the service is too late. It is very desirable that all these notices should be served

1832.

HARGEST

v.

FOTHERGILL.

while the parties are at home, and before they come to the Assizes.

Nonsuit.

Curwood and Carrington, for the plaintiff.

Maule, for the defendant.

[Attornies—*Owen*, and *Prothero & Phillips*.]

IN the ensuing term, *Curwood* moved for a rule to shew cause why the nonsuit should not be set aside; and subsequently a rule was made absolute for a new trial, on payment of costs.

In the case of *Doe d. Wartney v. Gray*, 1 Stark. 283, service of notice on the wife of the defendant's attorney, at his lodgings, on the evening before the trial, to produce a lease, was held insufficient. See the case of *Bryan v. Wagstaff*, *ante*, Vol. 2, p. 125.

**OXFORD SUMMER CIRCUIT,
1832.**

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BEFORE MR. JUSTICE BOSANQUET AND MR. BARON GURNEY.

=====

BERKSHIRE ASSIZES.

BEFORE MR. BARON GURNEY.

—

REX *v.* DENNIS COLLINS.

1832.

July 16th.

HIGH TREASON. As soon as the Grand Jury had returned a true bill—

Jervis, for the Crown, moved that the Sheriff should furnish the solicitor to the Treasury with a list of the persons who would be summoned on the Jury in this case, that a copy of it might be delivered to the prisoner pursuant to the statute.

Mr. Baron GURNEY ordered that the Sheriff should give the list applied for.

The prisoner having been brought into Court—

&c. the maim and wounding" of His Majesty, and with "compassing &c. the wounding" of His Majesty, are bad.

The prisoner, in a case of high treason, has a right to address the Jury in addition to the speeches of his counsel—and *semble*, that both the prisoner's counsel have a right to address the Jury, although there be no evidence on the part of the defence.

If a true bill be found against a person for high treason, the Judge will, on the application of the counsel for the Crown, order the Sheriff to furnish the solicitor to the Treasury with a list of the persons to be summoned on the Jury, that a copy of it may be delivered to the prisoner.

Semble, that counts charging a party with high treason in "compassing

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GURNEY, B., asked him whom he wished to have as his counsel and attorney. The prisoner named *Swabey* and *Carrington* as his counsel, and Mr. Frankum as his attorney; and his Lordship having ascertained that they consented to act as such, assigned them as counsel and attorney for the prisoner; and an order was drawn up, that they should have access to the prisoner at all seasonable hours.

The Assize was adjourned till the 22nd of August, to give time for a copy of the indictment, and lists of the Jurors and witnesses, to be delivered to the prisoner.

Considerably more than ten days before the trial, a copy of the indictment and caption, including the names of the witnesses on the back of the indictment, and also the words, "a true bill;" and a list of the witnesses' names, with their residences and additions; and also a list of the Jurors (a hundred in number) with their residences and additions (a), were delivered to the prisoner.

(a) As to the delivery of a copy of the indictment, the list of witnesses, and the list of the Jurors, to the prisoner—see the stat. 7 & 8 W. 3, c. 3; 7 Ann. c. 21; and 6 Geo. 4, c. 50. The indictment is to be delivered after bill found, and before arraignment. The number of days is reckoned, with respect to the indictment, exclusive of the day of delivery and day of arraignment; and with respect to the lists, exclusive of the day of delivery and day of trial; and in neither case ought Sundays to be reckoned. 1 Ea. P. C.

112. But by the stat. 39 & 40 Geo. 3, c. 93, it is enacted, that the provisions of the stat. 7 & 8 W. 3, c. 3, and 7 Ann. c. 21, shall not extend to any indictment for high treason in compassing and imagining the death of the King, where the overt act is any direct attack on his Majesty; and in the stat. 6 Geo. 4, c. 50, the like exception is made; so that if the indictment in the principal case had consisted of the first count only, the prisoner would not have been entitled to a copy of the indictment, &c.

BEFORE MR. JUSTICE BOSANQUET, AND MR. BARON
GURNEY.

1832.

Rex
v.
COLLINS.

August 22nd.

THE indictment consisted of five counts. The *first* count charged, that the prisoner, on the 19th of June, 2 Will. 4, at &c., maliciously and traitorously, with force and arms, "did compass, imagine, devise, and intend the death and destruction of our Lord the King (a); and, to fulfil, perfect, and bring to effect his most evil and wicked treason, and treasonable compassing and imagination

(a) By the stat. 36 Geo. 3, c. 7, it is enacted, "that, if any person or persons whatsoever, after the day of the passing of this act, during the natural life of our most gracious sovereign lord the king, (whom Almighty God preserve and bless with a long and prosperous reign), and until the end of the next session of Parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maiming or wounding, imprisonment or restraint of the person of the same our sovereign lord the king, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions or countries; or to levy war against his majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate

or overawe both houses, or either house of parliament; or to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions or countries under the obedience of his majesty, his heirs, and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof, upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons, so as aforesaid offending, shall be deemed, declared, and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit, as in cases of high treason."

By the stat. 57 Geo. 3, c. 6, the stat. 36 Geo. 3, c. 7, is made perpetual, so far as its provisions relate to the heirs and successors of his majesty, the sovereigns of these realms.

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 COLLINS.

aforesaid, he the said D. C., as such false traitor as aforesaid, on the said 19th day of June, in the second year of the reign aforesaid, at the parish aforesaid, in the county aforesaid, with force and arms, maliciously and traitorously did obtain and procure, and in his custody and possession did have and keep, divers, to wit, three stones, with intent thereby and therewith maliciously to kill and destroy our said Lord the King; and, further to fulfil, perfect, and bring to effect his most evil and wicked treason and treasonable compassing and imagination aforesaid, he the said D. C., as such false traitor as aforesaid, on the said 19th day of June, in the second year aforesaid, at the parish aforesaid, in the county aforesaid, with force and arms, maliciously and traitorously did, with great force and violence, cast and throw divers, to wit, two of the said stones, at and against the person of our said Lord the King, with intent thereby and therewith maliciously and traitorously to kill and destroy our said Lord the King, and with one of the said stones so cast and thrown as aforesaid, then and there struck, bruised, and wounded the person of our said Lord the King, against the duty of the allegiance of him the said D. C., against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his crown and dignity."

The *second* count charged that the prisoner did compass &c. "bodily harm to our said sovereign Lord the King, tending to the death and destruction of our said Lord the King." It stated the same overt acts as the first count, alleging an intent "to do bodily harm to our said Lord the King, tending to the death and destruction of our said Lord the King."

The *third* count charged that the prisoner did compass, &c. "the maim and wounding of the person of his said Majesty;" with the same overt acts as the first count, the intent being stated to be, "to maim and wound his said Majesty."

The *fourth* count charged that the prisoner did compass, &c. "the wounding of the person of his said Majesty;" and stated the same overt acts, alleging the intent to be, "to wound the person of his said Majesty."

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 v.
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The *fifth* count charged that the prisoner did compass, &c. "bodily harm to our said Lord the King, tending to the maim and wounding of the person of his said Majesty;" alleging the same overt acts, but stating the intent to be, "to do bodily harm to our said Lord the King, tending to maim and wound the person of his said Majesty."

It was proved that the prisoner had thrown two stones at his Majesty, while on the Ascot Heath Race-course; one of which struck his Majesty on the head. Every part of the case was proved by two witnesses (a).

Swabey addressed the Jury for the prisoner, and contended that the prisoner was insane, but called no witnesses.

Carrington was beginning to address the Jury—

Denman, A. G.—I do not mean to object to my learned friend, Mr. *Carrington*, addressing the Jury, but I would

(a) By the stat 7 & 8 Will. 3, c. 3, s. 2, no person can be convicted of high treason, except on the oath of two witnesses, unless he plead guilty. But it has been held, that, if one witness prove an overt act of treason, and another witness prove another overt act of the same species of treason, that is sufficient. 1 Ea. P. C. 130. It has also been held that this statute has made no new restriction on confessions, but any confession must be proved by two witnesses. Id. 134. But by the stat. 39 & 40

Geo. 3, c. 93, this statute is not to extend to any case of high treason in compassing and imagining the death of the King, where the overt act is a direct attack on his Majesty; but the party is to be "indicted, arraigned, tried, and attainted in the same manner, and according to the same course and order of trial in every respect, and upon the like evidence, as if such person or persons were charged with murder; but the judgment and execution are to be the same as in other cases of treason.

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merely submit that a second counsel has no right to address the Jury, if no witnesses are called for the defence.

Carrington referred to *Brunt's* case (a).

Mr. Justice BOSANQUET.—By the statute 7 & 8 W. 3, c. 3, the prisoner is to make his full defence by counsel learned in the law.

Mr. Baron GURNEY.—Perhaps, Mr. Attorney-General, you may be right.

Carrington addressed the Jury, and submitted (*inter alia*, that either the third and fourth counts, or the fifth count of this indictment, were bad. By the statute 36 Geo. 3, c. 7, it is enacted, that, if any person “shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction—maiming or wounding, imprisonment or restraint of the person” of his Majesty, he shall be guilty of high treason. Now, if the offences of intending to maim, and intending to wound, were high treason, then the words of the statute must be read thus, “shall intend death or destruction, or any bodily harm tending to death or destruction,” and the sentence must end there; and if so, the fifth count was bad: but if it were to be read thus—that the intending “any bodily harm tending to either the death or destruction, maiming or wounding” of his Majesty, is high treason, then the third and fourth counts were bad.

(a) 33 St. Tr. 1272. In that case Mr. Curwood had addressed the Jury, and proposed to examine a witness who was sworn, but whom he did not examine. Mr. Adolphus, as the junior counsel for the prisoner, then addressed the Jury, and commenced his address in the following terms:—“Gentlemen

of the Jury, the case for the prisoner having closed, without the calling of any witness on his behalf, it nevertheless falls to my lot to address to you a very few observations, and that arises from the peculiar benevolence of the law on the subject of high treason.”

After both the prisoner's counsel had addressed the Jury, Mr Justice BOSANQUET informed the prisoner, that if, in addition to what had been said by his counsel, he wished to add any thing himself, he was at liberty to do so.

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 COLLINA.

The prisoner made a statement of considerable length. to the Court and Jury.

Mr. Justice BOSANQUET left it to the Jury to say whether the prisoner had thrown the stones with either of the intents stated in the indictment.

The Jury found the prisoner guilty on the fifth count of the indictment (a).

Denman, A. G., Jervis, Campbell, Shepherd, and Maule, for the Crown.

Swabey and Carrington, for the prisoner.

[Attornies—*Maule & Bouchier*, and *Frankum*.]

(a) Sentence was passed on the prisoner; but he was afterwards reprieved. By the stat. 54 Geo. 3, c. 146, the sentence in cases of high treason is, that the person "shall be drawn on a hurdle to the place of execution, and there be hanged by the neck until such person be dead; and that afterwards the head shall be severed from the body of such person, and the body, divided into

four quarters, shall be disposed of as his Majesty and his successors shall think fit." But, by section 2 of the same statute, his Majesty may by his sign manual direct that the party shall not be drawn on a hurdle; or that the party shall be beheaded instead of being hanged; and may order the disposal of the body, head, and quarters.

1832.

BEFORE MR. BARON GURNEY.

July 17th.

REX v. GREEN and Others.

A prisoner ought to be told by the magistrate, that, if he makes any statement, it may be used as evidence against him; and that he must not expect any favour if he confesses: but the magistrate ought not to dissuade him from confessing.

INDICTMENT for burglary.—Two of the prisoners had made statements before the committing magistrates. The magistrates' clerk stated, that, before the prisoners said any thing, they were not only told that they must not expect any favour from confessing, but they were also dissuaded from confessing.

Mr. Baron GURNEY.—That was wrong. A prisoner ought to be told that his confessing will not operate at all in his favour; and that he must not expect any favour because he makes a confession; and that, if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that any thing he says to criminate himself will be used as evidence against him on his trial. After that admonition, it ought to be left entirely to himself whether he will make any statement or not: but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice.

Verdict—Guilty.

Justice, for the prosecution.[Attornies for the prosecution—*Ward & Son.*]

1832.

(*Civil Side.*)

BEFORE MR. JUSTICE BOSANQUET.

SHELLEY, Administratrix of SHELLEY, v. FORD.

July 18th.

THE first count of the declaration stated, that the intestate was the owner of a horse, which had been by him let to hire to one William Lewis; and that the defendant, to the injury of the intestate's reversionary interest in the horse, took it into his possession, and sold it. There was a similar count, stating the whole matter, except the letting of the horse, to have occurred since the death of the deceased; and there were also counts in trover. Plea—Not guilty.

A. let a horse on hire to B. for one month, B. kept it for two months, and then sold it to C.:—*Held*, that A. might recover the value of the horse from C., although C. had acted *bonâ fide*, and had paid B. the full value.

It appeared that, in the month of September, 1830, the intestate had let the horse on hire to Captain Lewis, for one month; and it was proved, by the admission of the defendant himself, that, in the month of November, 1830, he had bought the horse of Captain Lewis for 10*l.* which was then the full value of it; and that, after keeping it at livery for some time, he had sold it.

Justice, for the defendant.—I submit that this action cannot be maintained. The defendant acted *bonâ fide* in the buying of the horse; and he has at least a lien upon it for the amount of 10*l.*, the sum which he has paid for it; and, in any view of the case, that sum ought to have been tendered before any action was brought.

Mr. Justice BOSANQUET (in summing up).—In this case the property in this horse was in the intestate, and Captain Lewis had only a limited interest in it; he, therefore,

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 v.
 FORD.

when he sold it, could give the defendant no better title than he had got himself.

Verdict for the plaintiff—Damages 15*l*.

Curwood, Carrington, and Jeffreys Williams, for the plaintiff.

Justice, for the defendant.

[Attornies—*C. Carus Wilson*, and *G. S. Ford*.]

In general, no sale by a person who has no right to sell, is good against the rightful owner, except it be made in market overt; and it is laid down (Bac. Abr. tit. *Fair*, E) that every sale made in a fair or market overt, transfers a complete property in the thing sold to the vendee, however illegal the title of the vendor. In London, every day is market-day, except Sunday; so that a sale on any of these days is as good as it would be on the fair or market-day in the country; and in London every shop, except a pawnbroker's, is a market overt for such things as the owner professes to trade in; but in the country, the market overt is confined to the particular place or spot set apart by custom for the sale of particular goods.

However, the property in a horse is not changed as against the rightful owner, unless the provisions of the stat. 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12, (which will be found in Burn's Justice, tit. *Horses*), are complied with.

See also the case of *Gimson v. Woodfull*, ante, Vol. 2, p. 41.

As to factors and agents dealing with goods intrusted to them, see the stat. 6 Geo. 4, c. 94: and the case of *Dyer v. Pearson*, 4 D. & R. 653, as to the effect of the true owners allowing another to hold himself out as the owner of goods. As to the restitution of stolen goods on the conviction of the offender, see the stat. 7 & 8 Geo. 4, c. 29, s. 57, which is set out Carr. Sup. 334.

OXFORD ASSIZES.

BEFORE MR. BARON GURNEY.

DOE on the demise of CRAKE *v.* BROWN.

July 19th.

EJECTMENT. When this cause was called on in its order, it appeared that no brief had been delivered for the lessor of the plaintiff, and the attorney was not in Court.

A counsel, to whom a retainer in a cause has been given, no brief having been delivered, cannot withdraw the record.

Talfourd stated that he had a retainer for the lessor of the plaintiff, and wished to withdraw the record.

Mr. Baron GURNEY.—A retainer without a brief does not authorize you to withdraw the record. Mr. *Jervis*, you are for the defendant; do you wish the Jury to be sworn, and to nonsuit the plaintiff?

Mr. *Jervis*.—Yes, my Lord.

The Jury were sworn, and the plaintiff—

Nonsuited.

Talfourd, for the lessor of the plaintiff.

Jervis and *Carrington*, for the defendant.

[Attornies—*Mathews*, and *Eyre*.]

1832.

WORCESTER ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

July 23rd.

REX v. CROWTHER.

An indictment, which charges a forged check to be "a warrant and order for the payment of money, which said warrant and order is in the words and figures following," is good.

A forged check on the W. Bank was presented for payment at the S. Bank, where the supposed drawer never kept cash:—*Held*, that this was sufficient evidence of an intent to defraud the partners of the S. Bank, although there was no probability of their paying the check, even if it had been genuine.

FORGERY. The indictment charged the prisoner with having forged "a certain warrant and order for the payment of money, which said warrant and order is in the words and figures following—that is to say:

"WORCESTER OLD BANK.

"Hanbury Hall, Nov. 28, 1828.

"Messrs. Berwick, Wall, Isaac, and Lechmere, pay to Mr. John Perkins, or bearer, twenty-five pounds ten shillings.

John Phillips."

£25 : 10 : 0.

with intent then and there to defraud Francis Rufford and others. There were other counts, which charged, that the prisoner did "utter," and also "did offer, dispose of, and put off," the forged instrument, knowing it to be forged.

It appeared that this check, which purported to be a check on the Worcester Old Bank, was presented by the prisoner for payment at Messrs. Rufford's bank, at Stourbridge; and it was proved that they would not pay the amount, and that no person named John Phillips kept cash with them.

Godson and *F. V. Lee* objected that this case must fail upon two grounds:—First, because this indictment charged, in every count, that the prisoner either forged, uttered, or offered a "warrant and order;" which imported that he had committed an offence with respect to two instruments; and secondly, because it could not have been done

to defraud Messrs. Rufford, as they had no customer of the name of John Phillips; and there was, therefore, not the most remote chance of their paying the money.

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Mr. Justice BOSANQUET.—I am of opinion that this indictment is sufficient. In each of the counts there is only one instrument set out, and it is called—"A warrant and order for the payment of money, in the words and figures following." I think it is both a warrant and an order—a warrant authorizing the banker to pay, and an order upon him to do so. With respect to the other point, I think that the prisoner going to Messrs. Rufford's, and presenting this paper for payment, is quite sufficient evidence of an intent to defraud them.

Verdict—Guilty.

Shutt, for the prosecution.

Godson and *F. V. Lee*, for the prisoner.

[Attornies—*Robersons*, and *Pumfrey*.]

By the statute 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, it is enacted, "that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any warrant or order for the payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." By the statute 2 & 3 Will. 4, c. 123, the capital punishment is repealed,

except as to wills and testamentary papers, and certain powers of attorney; and by s. 3 of that stat. it is enacted—"That in all informations or indictments for forging, or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same; any law or custom to the contrary notwithstanding."

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July 24th.

REX v. JANE RICHARDS.

A girl, accused of poisoning, was told by her mistress, that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not admissible in evidence. Next day, a constable was sent for, and as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so: *Held*, that this was receivable, as the former inducement ceased on her being put into the hands of the constable.

INDICTMENT for administering poison, called oxalic acid (a), to Mary Duce, on the 23rd of April, 1832. It appeared that the prisoner, a girl of about 15 years of age, was in the service of the prosecutrix; and that, on the night of the 24th of April, 1832, the prosecutrix went into the prisoner's bedroom, just as she was going to bed, and told her that if she did not tell all about it that night, the constable would be sent for next morning to take her to Stourbridge, meaning before the magistrates there; and the prisoner then made a statement.

Mr. Justice BOSANQUET.—I think that we must not hear that.

It further appeared, that next morning a constable was sent for, who took the prisoner into custody; and while they were on the way to the magistrates' meeting at Stourbridge, she, without any inducement having been held out by the constable, made a statement to him.

The prisoner's counsel objected to this statement being received, as the inducement held out by the prosecutrix must be taken to have continued.

Mr. Justice BOSANQUET.—I think that this statement is receivable. The inducement was, that if she confessed that night, the constable would not be sent for, and she would not be taken before the magistrates. Now, she must have known, when she made this statement, that the constable was then taking her to the magistrates. The inducement, therefore, was at an end.

(a) See sect. 11 of the stat. 9 Geo. 4, c. 31, set forth, *ante*, Vol. 4, p. 372; and the case of *Rex v. Harley*, *Id.* 369.

The evidence was received.

Verdict—Not Guilty.

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REX
v.
RICHARDS.

Godson, for the prosecution.

Curwood and *Carrington*, for the prisoner.

[Attornies—*Holdsworth & F.*, and *Collis*.]

STAFFORD ASSIZES.

JONES, Assignee of STUBBS, an Insolvent, Demandant, v. July 31st.
BREARLY, Tenant.

WRIT of right. At the previous assizes, four knights (who were in fact esquires returned as knights by the sheriff) elected the grand assize; and at these assizes the four knights appeared, and twelve of those whom they had chosen appeared, and were sworn as the grand assize, together with the knights.

On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin.

As soon as they were sworn—

Campbell, for the defendant, placed 6s. 8d. on the table of the Court, contending, that, as he had tendered the demi-mark, the demandant must begin by proving the seisin of his ancestor.

Jervis, *Talfourd*, and *Justice*, *contra*, relied on the case of *Tooth v. Bagwell* (a).

Campbell.—If the demandant does not begin with proving his seisin, the greatest inconvenience will ensue. In

(a) *Ante*, Vol. 2, p. 271.

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 BREARLY.

this case a great deal of property is claimed by this writ of right, and it is held by my client under several different titles, and nothing is more probable than that when all these titles are gone through by us, the demandant may prove the seisin of his ancestor as to some very small part of the property.

Mr. Justice BOSANQUET.—I hold myself bound by the decision of the Court in *Tooth v. Bagwell*. In a case on the Northern Circuit, Mr. Baron Wood considered that there should be a previous finding of the seisin, but that is not so. The Court, in *Tooth v. Bagwell*, held, that the tenant should begin, though the seisin of his ancestor must be proved by the demandant at some time or other. Anciently, the tender of the demi-mark put the party on the proof of his seisin in some particular reign; but since the limitation of writs of right has been sixty years, it is held to put the party on the proof of his seisin within that time. However, the question here is, whether the demandant must prove the seisin of his ancestor in the first instance, or whether the tenant must begin. I think the tenant must begin.

The tenant began and went through his title. The demandant's leading counsel then addressed the Jury and went into his evidence; and the leading counsel for the tenant replied.

The Grand Assize found for the tenant.

Jervis, Talfourd, and Justice, for the demandant.

Campbell and R. V. Richards, for the tenant.

[Attornies—*Chilcote*, and *White*.]

HEREFORD ASSIZES.

BEFORE MR. BARON GURNEY.

REX v. JAMES GAMMON.

August 7th.

INDICTMENT for carnally knowing and abusing Charlotte Powell, a child under ten years old.

If, in a case of rape, there has not been sufficient penetration to rupture the hymen, the offence is not complete.

The child proved the offence, and Mr. Woollett, a surgeon, stated, that he found considerable local inflammation about the parts of the child, and that the hymen had been recently ruptured, and that he had no doubt that penetration had taken place; and it was also proved by the mother of the child, that, on examining the child, she found semen within the pudendum.

Mr. Baron GURNEY.—I think that if the hymen is not ruptured there is not a sufficient penetration to constitute this offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases; and I have always thought, and still think, that if there is not a sufficient penetration to rupture the hymen, it is not a sufficient penetration to constitute this offence.

Verdict—Guilty.

Greaves, for the prosecution.

Godson, for the prisoner.

[Attornies—*Griffiths*, and ———,]

See the cases of *Rex v. Cox*, ante, p. 297, and *Rex v. Wedge*, ante, p. 298. As, under the present state of the law, penetration is really the whole offence, it is highly proper that there should be

most satisfactory evidence that it really occurred. In *Russen's* case, 1 Ea. P.C. 438, it was held, that there might be a sufficient penetration to constitute the offence, although the hymen had not been ruptured.

MIDLAND SPRING CIRCUIT.

1832.

NOTTINGHAM ASSIZES.

1832.

KNOTTS v. CURTIS.

In case for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage.

THIS was an action on the case for an excessive distress. The plaintiff failed in proving any of the counts in the declaration, except one, stating that the defendant sold the goods without having them previously appraised, under statute 2 W. & M. sess. 1, c. 5, s. 2. The sale was by public auction, and fairly conducted; but the full value of the goods to the plaintiff was not obtained. The count was framed on statute 11 Geo. 2, c. 19, s. 19, and no specific damage was stated in it.

It was objected, on the part of the defendant, that, as this was an irregularity in the conduct of a distress, in order to entitle the plaintiff to recover on this count, he should both state and prove that specific damage had resulted to him from the omission to appraise; the statute enacting, that the party aggrieved by the irregularity shall "*recover full satisfaction for the special damage he shall have sustained thereby, and no more, in any action, &c.*;" and that, unless special damage was proved, the defendant was entitled to a verdict.

Mr. Justice J. PARKE.—The measure of the damages to be recovered by the plaintiff upon this count, is the

difference between the amount of the rent discharged by the sale, and the fair value to the tenant of the goods which have been sold. If the landlord sell fairly, for the best price which can be obtained, and which, doubtless, was in this case done, he will be protected if all his proceedings are regular, although the full value of the goods may not be obtained; but until an appraisement is made, the landlord has no right to sell, but only to keep; and, until sale, the tenant has a right to come in at any time and redeem his goods. The sale, therefore, being illegal, the tenant is entitled to the damages he has sustained thereby, *i. e.* to the difference between the fair value of the goods to him, and the amount of the rent discharged by the produce of the sale; and as this damage is the result of the illegal sale, it need not be specially stated in the count. In this case the amount of rent discharged by the sale, after deducting all expenses, was 5*l.* 10*s.*; the value of the goods to the tenant, as is proved, was 17*l.*; the verdict, therefore, must pass for 11*l.* 10*s.*

1832.

KNOTTs
v.
CURTIS.

Miller, for the plaintiff.

Adams, Serjt., and *Clinton*, for the defendant.

OLD BAILEY APRIL SESSION,

1832.

BEFORE LORD TENTERDEN, C. J., MR. BARON VAUGHAN,
MR. JUSTICE ALDERSON, AND N. KNOWLYS, ESQ.,
RECORDER.

1832.

April 6th.

REX V. DANIEL LYNCH.

It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon and death ensues, reduce the crime from murder to manslaughter.

THE prisoner was indicted for the wilful murder of William Harrington.

It appeared that the prisoner and the deceased, who had been for three or four years upon terms of intimacy, had been drinking together at a public house on the night of the 27th of February, till about twelve o'clock; that, about one, they were together in the street, when they had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and, on a policeman coming, went away. He, however, returned again between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen. The prisoner's father proved, that the knife, a common bread and cheese knife, was one which the prisoner was in the habit of carrying about with him, and that he was rather weak in his intellects, but not so much so as not to know right from wrong.

Lord TENTERDEN, in summing up, said—It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce

the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went anywhere for the knife. The father says, it was a knife he carried about with him, it was a common knife, such as a man in the prisoner's situation in life might have: for aught that appears, he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other. If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind, (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder.

Verdict—Guilty of manslaughter only.

Barry, for the prisoner.

1832.

REX
v.
LYNCH.

1832.

OLD BAILEY MAY SESSION, 1832.

BEFORE MR. JUSTICE LITTLEDALE, MR. BARON BOL-
LAND, AND MR. JUSTICE ALDERSON.

May 17th.

REX v. NOAKES.

Semble, that bats, which are long poles used by smugglers to carry tubs of spirits, are not offensive weapons within the meaning of the 6 Geo. 4, c. 108, s. 56.

A prisoner ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony.

THE prisoner was indicted under the 56th section of the 6 Geo. 4, c. 108, which enacts, "That if any persons, to the number of three or more, armed with fire-arms, or *other offensive weapons*, shall be assembled in order to be aiding and assisting in the illegal landing of uncustomed goods, every person so offending, and every person aiding, abetting, or assisting them, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon."

From the evidence for the prosecution, it appeared, that about a hundred persons were assembled, about twelve o'clock at night, at a place upon the Sussex coast, for the purpose of landing smuggled goods; that they were, as is usual on such occasions, divided into two different parties; one, called the company, who had bats in their hands for the purpose of carrying the tubs of spirits, (which bats were hop poles about seven feet in length), and the other, the protecting party, who were armed with muskets. The prisoner was one of the company, and carried a bat; but it appeared that he did not go down to the beach, but remained with several others, who also had bats, at the distance of a few fields off, for the purpose of preventing any who might be so disposed from running away without the tubs, if any firing should take place. He did not strike any one with his bat, either of his own party or of the revenue officers. But some of the men with bats struck with them some of the preventive men on duty. A witness was ask-

ed whether the prisoner had, in his hearing, engaged any persons to go out, and what he said to them?

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 REX
 v.
 NOAKES.

Clarkson, for the prisoner, objected, that what took place *previous* to the transaction in question was not evidence against him.

Denman, A. G., for the prosecution, replied, that it was evidence, under the particular terms of the act of Parliament, necessary to establish the facts required to be proved.

Mr. Justice LITLEDALE was of opinion that the evidence was admissible.

The witness stated a conversation between the prisoner and the landlord of a public-house, in which, when the landlord said that some of the men had been frightened, the prisoner observed "I had the biggest right to be afraid, for I called the fire-arm men, and went down with them, and brought away a pair of tubs."

This and some other part of the evidence depended upon the testimony of two accomplices; they stated, that the company did not know, before they went, that there was to be any firing, or any men with fire-arms, and that their object was to land the goods without violence. After the firing commenced, the prisoner was engaged in preventing the people from running away without the tubs.

C. Phillips, for the prisoner.—There is nothing to go to the Jury. The act requires, that the persons must be armed with fire-arms, or other offensive weapons, for the purpose of assisting in the landing of smuggled goods; and the evidence shews, that the bat which the prisoner had in his hand was not intended as an offensive weapon, as it was the thing used for the purpose of carrying the tubs.

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REX

v.

NOAKES.

Mr. Justice LITTLEDALE, (in summing up, *inter alia*,) said—You will have to consider whether bats are offensive weapons or not. The evidence is, that they are used to carry away small casks. But as they *may* be used for other, *viz.* for offensive purposes, you will have to say whether they are such or not. Then, was the prisoner there? Two of his accomplices speak distinctly to him. If these statements were the only evidence against him, I should not advise you to convict upon their testimony. It is not usual to convict upon the evidence of one accomplice without confirmation; and in my opinion it makes no difference that there are more than one. It does not appear that the persons hired were hired to use fire-arms. The prisoner is not proved to have carried any fire-arms himself. Supposing the bats to be offensive weapons, then a person, who, after the fire-arms had begun to be used, assisted in carrying away the goods, will have committed the offence, though he might not originally have gone to assist in landing with fire-arms, or might not have known at that time that fire-arms were to be used at all.

Verdict—Not guilty.

Denman, A. G., Shepherd, and R. Scarlett, for the Crown.

C. Phillips and Clarkson, for the prisoner.

1832.

May 18th.

REX v. ANN POULTON.

THE prisoner was indicted for wilful murder. The indictment stated, in substance, that the prisoner, on a certain day, was delivered of a female *bastard* child, which was born alive; and that she afterwards, to wit, on the same day, a certain string of no value, around the neck of the said female bastard child, did bind, tie, and fasten, and by such binding, &c., the said child feloniously and wilfully, of her malice aforethought, did choke and strangle, &c.

It appeared that the prisoner denied to several persons that she had had a child; but it was afterwards found concealed in a box. Three medical men were called on the part of the prosecution: the first said—"It frequently happens that a child is born as far as the head is concerned, and breathes, but death takes place before the whole delivery is complete. My opinion in this case is, that the child had breathed; but I cannot take upon myself to say that it was wholly born alive." The second said—"That death might have occurred when the child was partly born, if no medical man was present to assist in the delivery. The third said—"It is impossible to say when the child respired; but there is no doubt, from the state of the lungs when they were examined, that it had breathed: children may breathe during the birth."

With respect to the child being illegitimate, the only evidence was that of Mr. Thomas, the superintendent of the police; to whom, on his asking her whether any one beside herself knew of her situation, the prisoner said, that she had never told any one but the father of the child, and that he was a long way in the country; that his name was Thomas Harris or Harrison, and he had *lately got married*.

On the part of the prisoner, a woman proved, that, about three weeks before the delivery, the prisoner asked her to

To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which *was born alive*, the Jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth.

Where the indictment in such a case states the child to have been born a *bastard*, the proof that it was so, lies on the prosecutor; but evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had *lately got married*, has been held to be sufficient proof to support the allegation.

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v.
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buy her a piece of diaper to make napkins, and afterwards, seeing her again, asked her if she had bought it, and desired her “to let her daughter set on to make the napkins.”

Mr. Justice LITTLEDALE (in summing up), after stating the indictment, said—The allegation is, that this was a female *bastard* child, and on the form of this indictment it becomes necessary to prove that fact. But it seems to me that the evidence of Mr. Thomas is sufficient to make it out, if you believe that he speaks the truth, which there does not appear any reason to doubt. Then the material question for you will be, was the child born alive. For, if it was not, the prisoner cannot be convicted of the murder. But, if you think there is sufficient evidence that the child was born alive, then you will inquire if the prisoner was the cause of its death; and if you think she was, you will find her guilty of the murder. But if you are of opinion, either that the child was not born alive, or that the prisoner was not the cause of its death, then she may be found guilty of endeavouring to conceal the birth, if you think that fact is made out under the provisions of the 9 Geo. 4, c. 31, s. 14. With respect to the concealment, it seems to me, that the putting the child in the box is very strong evidence of concealment, coupled with the denial of the fact of her having had a child at all; notwithstanding, there is some little evidence of previous preparation in the ordering of the napkins. With respect to the birth, the being born must mean that the whole body is brought into the world; and it is not sufficient that the child respire in the progress of the birth. Whether the child was born alive or not depends mainly upon the evidence of the medical men. None of them say that the child was born alive; they only say that it had breathed: and if there is all this uncertainty among these medical men, perhaps you would think it too much for you to say that you are satisfied that the child was born alive.

The Jury said, they thought that the child was not born alive.

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Mr. Justice LITTLEDALE then told them, that he thought they could have no doubt on the evidence as to the concealment.

The Jury then found the prisoner not guilty of the murder; but said, that she did, by disposing of the body in a box, endeavour to conceal the birth.

Clarkson, for the prisoner.

See Archbold's Criminal Law, pp. 333 *et seq.*

BEFORE NEWMAN KNOWLYS, ESQ., RECORDER.

REX v. CHALMERS.

May 24th.

FORGERY.—The prisoner was indicted for forging the acceptance of a bill of exchange. The offence was alleged in the indictment to have been committed on the 12th of March, 1830 (which was in the reign of his late Majesty, King George the Fourth); and the indictment concluded, “against the peace of our Lord the King.”

An indictment preferred in 2 Will. 4, for a felony committed on the 12th of March, 1830, charged the offence to have been “against the peace of our Lord the King.” This was objected to as soon as the case for the prosecution had closed. The prisoner was convicted, and the fifteen Judges held the conviction right.

At the conclusion of the case for the prosecution, the prisoner's counsel objected that the indictment was bad, as it concluded “against the peace of our Lord the King,” and was for an offence alleged to have been committed in the time of his late Majesty; and they submitted, that, although the entire omission of the *contra pacem* could, since the statute 7 Geo. 4, c. 64 (a), only be taken advantage of on demurrer; yet the stating of the offence to have

(a) Sect. 20, set forth Car. Supp. p. 40.

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been against the peace of his Majesty, at a period before his reign began, was as much an objection as it would have been before the statute.

The RECORDER reserved the point, and the prisoner was found—

Guilty.

C. Phillips and *Sturgeon*, for the prosecution.

Adolphus and *Barry*, for the prisoner.

The case was afterwards considered by the fifteen Judges, who held the conviction right.

OLD BAILEY JUNE SESSION, 1832.

BEFORE MR. JUSTICE GASELEE AND MR. JUSTICE
 JAMES PARKE.

—◆—
 REX v. SMITHIES.

Observations made by a wife to her husband, upon a subject which afterwards becomes matter of a criminal charge against him, and to which he gave no direct reply, may be opened to the jury by the counsel for the prosecution.

THE prisoner was indicted for the wilful murder of Ellen Twamley by setting fire to his own house.

Adolphus, in opening the case for the prosecution, was about to state some observations made to the prisoner by his wife on the subject of the fire, to which he made an evasive reply.

Clarkson, for the prisoner, stated that he was informed the wife was in Court, and, if she could by law be examined, would give a direct contradiction to the proposed statements; and submitted, that, under these peculiar circumstances, it was doubtful whether the evidence could be

received, and therefore the statements ought not to be made.

Mr. Justice GASELER and Mr. Justice J. PARKE, were both of opinion that the statement might be made to the jury; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as evidence of an implied admission on his part.

Verdict—Guilty.

Adolphus, and *C. Phillips*, for the prosecution.

Clarkson, and *Barry*, for the prisoner.

[Attornies— ———, and *Humphreys*].

See the case of *Rex v. Swatkins*, ante, Vol. 4, p. 548.

OLD BAILEY DECEMBER SESSION, 1832.

BEFORE MR. BARON BOLLAND AND MR. JUSTICE
BOSANQUET.

REX v. CATHERINE SPILLER.

Dec. 4th.

MANSLAUGHTER.—The *first* count of the indictment charged that the prisoner, on the 7th of November, 3 Will. 4, at &c., in and upon one Mary Elizabeth Landon feloniously “did make an assault; and that the said

Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is

bound to have competent skill; and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter.

An allegation in an indictment, charging that the death of a person was caused by a plaster made and applied by the prisoner, is sufficiently proved, by shewing that three plasters were applied, and that two of them were applied by the prisoner, and the third made from materials furnished by the prisoner.

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Catherine Spiller a certain plaster made and prepared by the said C. S., with certain corrosive and dangerous ingredients, then and there feloniously did put, place, and fix upon the head of the said M. E. L., she the said C. S. then and there well knowing the said plaster so made and prepared by her the said C. S. to be made and prepared with corrosive and dangerous ingredients; and that the said C. S., by such putting, placing, and fixing the said plaster upon the head of the said M. E. L. as aforesaid, then and there feloniously did give unto the said M. E. L. divers mortal wounds and sores in and upon the head of the said M. E. L., of which said mortal wounds and sores the said M. E. L., from the said 7th day of November in the year aforesaid, until the 15th day of November in the same year, at" &c., did languish, &c. The *second* count charged that the prisoner, on &c., at &c., in and upon the deceased feloniously "did make an assault; and that the said C. S. a certain plaster, made and prepared by her the said C. S. with certain corrosive and dangerous ingredients, then and there feloniously did put, place, and fix upon the head of the said M. E. L., by means of which putting, placing, and fixing the said plaster upon the head of the said M. E. L. as aforesaid, the said M. E. L. then and there became and was mortally sick and diseased; of which said mortal sickness and disease the said M. E. L., from the said 7th day of November in the year aforesaid, until the 15th day of November in the year aforesaid, at" &c., did languish, &c.

It appeared that Mary Elizabeth Landon, the deceased, was a child of the age of two years and eight months; and that for the last eighteen months previous to her death, she had been afflicted with scald-head; and that she had been attended in succession by two physicians and a surgeon, but without any more than temporary relief; and that, in the month of November, 1832, the deceased was taken to the prisoner, who applied two plasters successively

all over the deceased's head. But a third plaster, which was applied the last before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with the materials which had been given by the prisoner to the mother for that purpose. It was proved by two surgeons, that there was a general sloughing of the scalp of the deceased's head, which had caused the death of the deceased; and they stated, that in their opinion this might have been produced by the plasters. There was no evidence at all to shew of what ingredients any of the plasters were composed.

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Adolphus, for the prisoner.—Some time ago, I should have argued that this prisoner, having used her best skill to cure the child, was not answerable, although she was not a licensed practitioner; but I will now draw the attention of the Court to the form of the indictment, which charges that the death of this child was caused by the application of a plaster made of corrosive and dangerous ingredients, which was made by the prisoner: which allegations ought to be proved. Now, there is no evidence that any one plaster caused the death, nor that the ingredients were either corrosive or dangerous, or that any of these plasters were made by the prisoner; and it is also not proved that, even if any plaster caused the death, it was either of those put on by the prisoner.

BOLLAND, B.—It is my opinion, and that of my learned brother, that this case must go to the Jury. The indictment charges that the prisoner made a plaster of corrosive and dangerous ingredients, which was put on the child's head; and though indictments often go on to say, that the prisoner "caused and procured" the thing to be done, we think that if the plaster was made by the direction of the prisoner, that is enough. As to the question, whether it be manslaughter or not, the Judges have considered,

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that any person, whether licensed or unlicensed, who deals with the life or health of any of his Majesty's subjects, is bound to use competent skill, and sufficient attention; and if the patient dies for the want of either, the person is guilty of manslaughter.

The prisoner, in her defence, said, that in this instance she had used the same remedy which she had previously applied with success to other persons.

Seven witnesses (many more being in attendance) were called, who stated that they had applied to the prisoner to cure them, or some member of their families, of diseases of which regular practitioners had not been able to cure them; that the prisoner had cured them; and that they were perfectly satisfied with her skill, attention, and humanity of treatment.

The Jury expressed a wish that the case should go no further.

BOLLAND, B. (to the Jury)—The law, as I am bound to lay it down (and I believe that I lay it down as it has been agreed upon by the Judges, for cases of this kind have occurred of late more frequently than in former times), is this—if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention, and assiduity.

Verdict—Not guilty.

Adolphus and C. Phillips, for the prisoner.

[Attornies—*Harmer & Co.*]

See the cases of *Rex v. Long*, *ante*, Vol. 4, pp. 398 and 423, and the authorities there referred to.

COURT OF COMMON PLEAS.

Adjourned Sittings at Westminster after Hilary Term, 1832.

BEFORE LORD CHIEF JUSTICE TINDAL.

CUTLER and Another v. CLOSE.

Feb. 3rd.

ASSUMPSIT to recover a sum of 70*l.*, upon a contract for providing and erecting a warm air stove and apparatus in a chapel at Kilburn. The defendant was one of the congregation.

On the part of the plaintiffs, it was proved that the stove was erected, and, after it had been tried for some time, an objection was made to the position of some of the air pipes, and an alteration had been made. It was also proved by several witnesses, who went to the chapel for the purpose of giving evidence, that the effect of the stove was considerable.

On the part of the defendant, the clergyman and several of the congregation proved, that, in one part of the chapel the heat was very great, while at another part it was very cold. Some of the witnesses for the plaintiffs attributed the inconvenience to the mismanagement of the servants of the chapel, and some of those for the defendant contended it was caused by the improper placing of the pipes, and the want of a dry drain. Soon after the alterations had taken place, the defendant wrote a letter to the plaintiffs, in which he mentioned the imperfect manner in which the apparatus had been executed, adding these words " It cannot, in the judgment of any competent person, even now, be said to be completed in such a way as to satisfy us as trustees of a chapel, or tradesmen of such respectability as we have always considered you to be."

Where a party contracted to supply and erect a warm air apparatus, for a certain sum:—

Held, in an action for the price, (the defence to which was, that the apparatus did not answer) that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite.

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Wilde, Serjt., for the defendant, contended that the plaintiffs were not entitled to recover the price, as they had not made the stove reasonably fit and proper to answer the purpose for which it was intended.

Bompas, Serjt., for the plaintiffs.—The law is this: If we have done the work imperfectly, they may bring a cross action against us; but, if they have derived *any* advantage from it, they must pay us the price. They have kept the apparatus and used it; and their letter to us does not point out any specific thing to be done; if it had, we would immediately have done it. They only speak of the *imperfect manner* in which the apparatus had been executed, and say, that it could not be said to be *completed* in such a way as to satisfy them as trustees of a chapel, or the plaintiffs as tradesmen of respectability.

TINDAL, C. J., (in summing up), said—This is an action for the price of a hot air stove, which the plaintiffs contracted to erect in Kilburn chapel. The contract, which was made in September 1829, was to erect a powerful stove for a price not exceeding 70*l*. The plaintiffs say, that they have performed their contract, and are entitled to be paid. On the contrary, the defendant says, that the apparatus is not *at all* of the sort he contracted for, and therefore he is not liable to pay for it. The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent and unfit for the purpose, and, either from that or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay. If it is perfect, and the fault lies in mismanagement at the chapel, then the plaintiffs will be entitled to recover the whole price. But there is another view of the case. The apparatus may be in the main substantial, but not quite so complete as it might be according to the contract; and, in that case, if it can be made good at a reasonable ex-

pense, the proper course will be to give your verdict for the plaintiffs, deducting such sum as will enable the defendant to do that which is requisite to make it complete. The question upon this part of the case will be, whether it was a stove calculated to answer the purpose intended, though it might not be altogether and completely sufficient. It seems, from the evidence, that the defendant never considered this as a complete answer to the claim until the present action was brought, because in May 1831, he speaks of it in his letter, as an apparatus which might be made better, and not as a complete failure. It appears, from the evidence on both sides, that the stove does warm a part of the chapel, but not the whole. If you think, as the defendant says, that the stove is of no service, not at all answering its purpose, then you will find your verdict for the defendant. On the contrary, if you think, as the plaintiffs say, that it is perfect, and that the fault is in the management of the fire, &c., then you will find for the plaintiffs, and give them the full price. But, if you are of opinion that any thing is required to be done to make it complete, you will deduct what sum you think right on that account.

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CUTLER
v.
CLOSE.

Verdict for the plaintiffs—Damages 60*l*.

Bompas, Serjt., and *Comyn*, for the plaintiffs.

Wilde, Serjt., and *C. Cresswell*, for the defendant.

[Attornies—*H. H. Duncombe*, and *Bell & Co.*]

See the case of *Milner v. Tucker*, Vol. 1 of these Reports, p. 15; *Cush v. Giles*, Vol. 3, p. 407; and *De Sewanberg v. Buchanan*, *post*, p. 343.
Percival v. Blake, Vol. 2, p. 514;

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Feb. 4th.

DAY v. DAVIES.

It will not prevent a plaintiff from giving evidence on a *special* count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts.

ASSUMPSIT. The *first* count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would accept a bill of exchange made by him for 35*l.* 12*s.* 6*d.*, and would deliver it, so accepted, to defendant, that he might negotiate it for his own benefit, the defendant undertook to indemnify him from any loss or damage for or by reason of his acceptance of the bill. It then averred the acceptance, &c., and that the bill had long become due, yet the defendant did not nor would indemnify him ; in consequence whereof the holder commenced an action in the Palace Court against the plaintiff, and caused him to be arrested, whereby he was kept in custody, and was forced to give a bail-bond, and to pay costs, and was injured in his business. There were counts for money paid, money had and received, &c. Plea—The general issue, with a notice of set-off.

The particular of demand was as follows:—"The plaintiff seeks to recover, *under the indebitatus counts* of the declaration in this cause, the sum of 35*l.* 12*s.* 6*s.*, being the amount of a certain bill of exchange drawn by the defendant on the plaintiff, and accepted by the plaintiff for the accommodation of the defendant, on or about the 22nd day of June, 1830, and which bill the plaintiff has been compelled to take up and pay, together with costs, making up the sum of 50*l.*"

Taddy, Serjt., contended, that the plaintiff must, under this particular, be confined to the claim stated in it.

TINDAL, C. J., was of opinion that the particular was only required to explain the common counts, but that the plaintiff might recover on the special count any damage which he had sustained in consequence of the dishonor of the bill, and was not confined to the recovery of money

which he had actually paid. It did not follow, that, because a particular had been given applying only to the *indebitatus counts*, therefore the plaintiff was precluded from going into evidence upon a special count, to which the particular did not profess to apply.

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DAVIES.

Verdict for the plaintiff—Damages 38*l*.

Wilde, Serjt., and *Rogers*, for the plaintiff.

Taddy, Serjt., and *A. A. Park*, for the defendant.

[Attornies—*J. D. Blake*, and *Cowburn*.]

TEMPERLEY v. SCOTT.

Feb. 9th.

ASSUMPSIT on a policy of insurance on the ship *Kinersley Castle*.

The examination on interrogatories of the ship's carpenter, who was abroad at the time of the trial, was used on the part of the plaintiff, but the examination in chief only was read.

Wilde, Serjt., for the defendant, required that the answers to the cross-interrogatories should be also read.

Where the examination on interrogatories of an absent witness is read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case.

Taddy, Serjt., for the plaintiff, contended, that he was not bound to read them on the part of the plaintiff, but that if the defendant wanted them he might introduce them as his case.

TINDAL, C. J.—I cannot form any distinction between the examination *viva voce* and the examination on paper. If the witness was here, the cross-examination would immediately follow on the examination in chief; and I do

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not see any reason why they should be separated when the examination is in writing. On the contrary, it rather seems to be more important when the witness is absent that the whole should appear at once. The evidence is not sifted till the cross-interrogatories are put.

The answers to the cross-interrogatories were then read.

Nonsuit.

Taddy, Serjt., *R. Alexander*, and *Addison*, for the plaintiff.

Wilde, Serjt., and *C. Cresswell*, for the defendant.

[Attornies—*Williamson*, and *Bell & B.*]

Feb. 9th.

WILLIS v. BERNARD.

In an action of crim. con., letters written by the wife to third persons, before she became acquainted with the defendant, and in which she mentioned her husband, are receivable in evidence to shew the terms on which they were with respect to affection.

CRIM. CON.

On the part of the plaintiff, in addition to letters written by his wife to him, while they were absent from each other, it was proposed to read one which was written by her, before she became acquainted with the defendant, to the plaintiff's brother, who was a clergyman, on the subject of some arrangement of her property for the benefit of her husband and family.

Spankie, Serjt., objected to this as a novel species of evidence, and also as improper to be received upon principle. He contended, that when a wife wrote letters to a third person, there was not that security for the honest and *bond fide* expression of sentiment which there was in letters written to the husband himself, as various reasons might induce her to gloss over or conceal matters when communicating with a third person.

TINDAL, C. J.—I think it is receivable. We are in the habit of hearing what the wife has *said*, to other persons, of her husband, and I do not see why we may not hear what she has written of him. The letter is less likely to be mistaken than the oral statements, which depend upon the recollection of a witness. But I will take a note of your objection.

The letter was read.

Verdict for the plaintiff—Damages 1000*l*.

Wilde, Serjt., and *Wightman*, for the plaintiff.

Spankie and *Storks*, Serjts., and *Thesiger*, for the defendant.

[Attornies—*Whitton & G.*, and *J. & W. Lowe*.]

A Rule *nisi* was obtained in Easter Term, which, after argument, was, in the course of the same term, discharged. See 1 *Moore & Scott*, 584 (a).

(a) See the cases of *Edwards v. Stark*, 192; and *Hoare v. Allen*, 3 *Crock*, 4 Esp. 39; *Trelawney v. Esp*, 276. *Coleman*, 1 B. & A. 90, and 2

DE SEWHANBERG v. BUCHANAN.

Feb. 11th.

ASSUMPSIT by the plaintiff, as indorsee of a bill of exchange for 200*l*., drawn by one Marsack, on, and accepted by, the defendant, for Marsack's accommodation. The consideration for the bill was a picture, which was the property of the plaintiff, a Dutch Baron, and which Marsack, who was a picture dealer, saw at the house of a

A. sold a picture to B. as a Rembrandt. There was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty,

or only a representation. The picture was kept:—*Held*, that, if the Jury thought there was a warranty, and that it was broken, then they should find their verdict for that sum which they considered to be the actual value of the picture.

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person named Child, to whom it was sent to be cleaned. Marsack, when he saw the picture, said that it was a very pretty picture, and that he should like to have it, but had no money to pay for it. Upon this, an interview took place at Child's house, between the plaintiff and Marsack, at which the price was stated to be 200*l.*, and, according to the testimony of one person who was present, the plaintiff said—"I warrant you that it is a true picture of Rembrandt's; I am an *ancien militaire*, and would not deceive you." But Child, who was also present at the interview, stated that he did not recollect the using of the word "warrant," and that he did not think that it was used by the plaintiff. He also said, that he thought it a very beautiful picture; but he was not asked whether he thought it was a Rembrandt. The bill, when it became due, was in the hands of a person named Gregory; and, on his applying for payment, several letters were, in the absence of the defendant in the country, written by his wife, requesting time. On the part of the defendant, several witnesses were called, who were acquainted with the value of pictures, who, being shewn the picture in question, said, that they did not think it was a Rembrandt, or even a Gerard Dow, who was his pupil; and that, in their opinion, it was not a picture which a connoisseur would purchase at all. They varied in their estimate of its value from 25*l.* to 10*l.* They said that the pencilling was not like that of Rembrandt.

Andrews, Serjt., for the defendant, submitted that the plaintiff was not entitled to recover, as the picture had been proved to be comparatively worthless, as it was not a Rembrandt, and was valued, at the highest, only at 25*l.*, and was, in fact, of no use to a connoisseur in pictures. He contended, also, that the letters written by the defendant's wife, in his absence, were of no effect in the case, as they were not written to the plaintiff, but to Mr. Gregory, against whom, as the holder, she might think that her husband had no defence.

Wilde, Serjt., for the plaintiff.—Under the circumstances of the case, it is evident, that what took place did not amount to a warranty, and that Mr. Marsack, who was a dealer in pictures, acted upon his own judgment in the matter. In the case of *Jendwine v. Slade* (a), which was an action to recover damages on the sale by auction of two pictures, one of which was stated in the catalogue to be a Sea Piece, by Claude Lorraine, and the other a Fair, by Teniers, when, in fact, they were only copies. On the one side it was contended, that the statement in the catalogue amounted to a warranty; and on the other, that it was not a warranty, but merely a statement of a supposed fact, upon which the buyer was to exercise his own judgment: and Lord *Kenyon* said, it was impossible to make it the case of a warranty, as the pictures were the work of artists some centuries back; and there being no way of tracing the picture itself, it could only be matter of opinion; and that the catalogue only imported that, according to the notion of the seller, the picture was the work of the artist whose name was set against it. Now, the opinion of the Judge in that case will clearly apply to the present, if there was not, in fact, any warranty, as I submit there was not; for, if there had been, Child, who was present at the time, must have heard it given.

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TINDAL, C. J., in summing up, said—The question is, whether you think that a warranty was, in fact, given, and that it was broken? For, if you do, you must find your verdict for such sum as you think to be the real value of the picture (b). But, if there was no express warranty, but only a representation, then, as there is no evidence

(a) 2 Esp. N. P. C. 572.

(b) If the picture had not been kept by Marsack, the plaintiff would not have been entitled to recover any thing on the bill. See

the case of *Lomi v. Tucker*, Vol. 4, of these Reports, p. 15. See also *Cutler v. Close*, ante, p. 338, and the authorities there referred to.

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that the plaintiff did not believe that the picture was not a Rembrandt, he will be entitled to recover the full amount of the bill.

Verdict for the plaintiff for the full amount.

Wilde, Serjt., and *White*, for the plaintiff.

Andrews, Serjt., and *Follett*, for the defendant.

[Attornies— *J. Duncombe*, and *Lane*.]

Adjourned Sittings at Guildhall, after Hilary Term, 1832.

Feb. 14th.

GARTH v. HOWARD and FLEMING.

If A., without the authority of B., pledges his property with C., a joint action of detinue is maintainable by B. against both A. and C. Whether in such an action a verdict may be taken against one defendant only—*Quære*.

Statements made by the shopman of a pawnbroker who is left in the shop to answer in his master's absence, can only be received

in evidence in an action against the master, when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable if they relate to an advance of money not within the terms of the Pawnbroker's Act.

If the Jury, in such a case, are satisfied that B. *held out* A. as a person authorized to pledge his property for the purpose of raising money, they may find a verdict for both defendants.

DETINUE for plate. Pleas—*First*, the general issue by each defendant—*Secondly*, a plea by the defendant Fleming that the plate was deposited with him as a security for a sum of 200*l.* advanced by him to the other defendant, Howard, for the use of the plaintiff—and *Thirdly*, another plea by the defendant Fleming, stating that the plaintiff was indebted to him in the sum of 200*l.*, and that the plate was pledged for the debt. The replication traversed the pleas.

It appeared that the plaintiff was the son of General Garth, who died about the latter end of the year 1829; and the defendant Howard, who was the plaintiff's solicitor, went down to the General's country house in Dorset-

shire, and told his solicitor, Mr. Boswell, that he was come down to take possession of the goods, which consisted of furniture and plate; and in consequence two boxes of plate, accompanied by an inventory, were sent from the General's bankers to Howard, who gave a receipt in this form:—

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“ February 6th, 1830.

“ Received of Mr. Edward Boswell two boxes of plate belonging to the late General Garth.

“ For Captain T. Garth,
“ Edwd. Jno. Howard.”

It was also proved, that another quantity of plate, which was at the General's town house, was handed over to Mr. Howard, who compared it himself with the inventory. The witness who proved this (who was the town solicitor of the General,) said, that he knew that Mr. Howard was acting as Captain Garth's solicitor, and that the captain was in pecuniary difficulties.

To connect the defendant Fleming, who was a pawnbroker, with the possession of the plate, a demand of it was proved to have been served at his shop on a young man, who told the person who served it, that Mr. Fleming was at Paris, and that he answered for him when he was away. It was also proved that the young man went the same day to the office of the plaintiff's attorney; and it was proposed, on the part of the plaintiff, to give in evidence what he said there.

TINDAL, C. J., thought that he ought to be called as a witness; and that, as no act had been proved to have been done by Mr. Fleming, they could not treat the shopman as his agent, and give his declarations in evidence to affect his master.

Spankie, Serjt., submitted, that, under the circum-

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stances of the case, the shopman must be taken to be the agent of his employer.

TINDAL, C. J., said, he thought that it would be going further than the Courts had ever gone before; but that he would receive the evidence and take a note of the objection.

It was then proved by the plaintiff's attorney that the shopman said, when he came to the office, that Mr. Fleming was at Paris, and requested that process might not be sued out against him for ten days. He said, it would be a hard thing on Mr. Fleming, who had advanced Mr. Howard 200*l.* upon the plate, if he were forced to give it up. He also said, that he would go to Mr. Fleming's brother, and take his advice as to what he was to do. This was on the 17th of September, and the attorney waited till the 1st of November, when he wrote a letter to Mr. Fleming, and three days after sued out process.

Wilde, Serjt., for the defendant Howard.—To sustain this action, the plate should have been shewn to be potentially in the possession of Mr. Howard at the time the action was brought. Now the plaintiff has shewn that it was out of his custody on pledge, and on a pledge, too, apparently for the benefit of the plaintiff.

TINDAL, C. J.—The question is, whether Howard has wrongfully pledged. If he has done so he is answerable. As he has the right to claim the plate, as between him and Fleming, he might acquire the possession of it from Fleming by paying him the money advanced upon it.

Wilde, Serjt.—It was not in his power at the time of action brought, and it should have been to maintain this form of action.

TINDAL, C. J.—I think it may be considered as in his power, though not in his actual possession.

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Wilde, Serjt., then addressed the Jury for the defendant Howard.

Andrews, Serjt., addressed the Jury for the defendant Fleming.

Various letters were put in and read, written by the plaintiff to the defendant Howard, shewing that he was in very great want of money, and also a power of attorney dated the 12th of December, 1828, relating, among other matters, to the raising of money upon some books.

Spankie, Serjt., for the plaintiff.—An authority to pawn books at one time does not give the authority to pledge plate at a considerable time afterwards. But the power of attorney does not give any authority to pledge, it is only to sell in the ordinary way. A factor could not pledge by the common law, though he could sell. It is not shewn that the state of the account between the plaintiff and Mr. Howard authorized any pledge. He who, after a demand, detains property on the authority of a person who obtained it illegally, is a co-delinquent, and liable to answer for the detention as much as the person from whom he received it.

TINDAL, C. J., left it to the Jury to say whether there was any authority from the plaintiff to Howard to pledge the plate; for, if there was not, the verdict must pass against both defendants, as one could not stand in a better situation than the other.

The Jury, after some consultation, said that they wished, if possible, to protect the pawnbroker; but, under his

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Lordship's direction found a verdict for the plaintiff generally.

Spankie, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., and *Follett*, for the defendant Howard.

Andrews, Serjt., and *Godson*, for the defendant Fleming.

[Attornies—*Whitelock*, and *Howard*—*Fleming*.]

IN the ensuing Easter Term a rule *nisi* for a new trial, pursuant to the leave given, was moved for and obtained. Which rule, after argument, was made absolute, on the ground, that, as the transaction was not one entered into by the defendant in his business of a pawnbroker (*a*), the shopman's declarations were not admissible; and the cause came down again for trial at the adjourned sittings after Michaelmas Term.

(*a*) The Pawnbroker's Act, 39 of 10/. For the report of the
 & 40 Geo. 3, c. 99, only allows motion in banc, see 1 Moore &
 pledges to be taken to the amount Scott's Reports, p. 628.

Dec. 20th.

SAME v. SAME.

THE same evidence was given as on the former trial, with respect to the delivery of the plate to the defendant Howard, and also as to the service of the demand at the shop of the defendant Fleming. But instead of giving in evidence the statements made by the shopman of the defendant Fleming, the shopman was called as a witness, and proved, that, about the 1st of February, 1830, he went to the house of the defendant Howard, and looked at the

plate in question'; that he told his master that he had seen it, and that the 200*l.* was advanced upon it; and it was brought to his master's house. He further stated, that during his master's absence at Paris in September, the time when the demand of the plate was served upon him at the shop, he was authorized to conduct the business of the shop; and that, in consequence of such service, he went to the office of Mr. Whitelock, the plaintiff's attorney, on behalf of his master.

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He was then asked what he told Mr. Whitelock.

Andrews, Serjt., objected, that what was stated by the shopman on a subject not within the scope of his agency was not receivable in evidence.

TINDAL, C. J.—You may ask him whether he told Mr. Fleming afterwards what he had said to Mr. Whitelock.

The witness stated, that when Mr. Fleming returned from Paris he shewed him the demand, and told him he had been to Mr. Whitelock to stay proceedings till his return; that Mr. Fleming asked him whether he knew that the plate was Garth's; and he replied, that he did not; that he communicated to Mr. Fleming the conversation between Mr. Whitelock and himself; and that Mr. Fleming did not say whether he had done right or not; that he told Mr. Whitelock it would be a very hard case to proceed against Mr. Fleming, as they had often done business for Captain Garth before. The witness further stated, that *no duplicates were given for the plate*, and that Mr. Howard told him, when the 200*l.* was advanced, that he wished to raise the money for the use of Captain Garth, as he had done before.

It appeared that the accounts between the plaintiff and Mr. Howard had been referred, by an order of the King's Bench, to Master Goodrich, who, on the 17th November, 1831, stated, by his *allocatur*, that Mr. Howard had re-

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ceived of Captain Garth 1776*l.* 11*s.* 5*d.*; that his bills of costs delivered amounted to 2053*l.* 13*s.* 10*d.*, of which 788*l.* was taxed off.

From Mr. Howard's cash account, delivered under a Judge's order, it appeared, that, on the 1st of January, 1830, the balance in his favour was 703*l.* 18*s.* 11*d.*, and that, on the 1st of February, he received a sum of 300*l.* more. The 200*l.* was included in the account, and also 10*s.* for expenses connected with it; but these were struck out by the Master as being the subject-matter of this action.

The bills of costs were produced, and the following items read—

“ 15*th* February, 1830—Clerk's attendance on Mr. Fleming, in Brewer Street, to request him to call at my office to look over your plate, as I wished him to advance a sum of money thereon.

“ 16*th*—Attending Mr. Fleming this morning, going over the whole of the plate with the inventory delivered by Mr. Boswell.

“ *Same day*—Attending him, when he informed me he would lend the sum of 200*l.*”

Also the following—

“ 18*th* January, 1830—Attending Mr. Fleming this morning, on the subject of a dressing case and a diamond ring, on which he was willing to advance 40*l.* Attending for duplicates, and paid for same 2*s.* 6*d.* Writing Lady Astley, informing her &c. &c., and *sending her the 40*l.* (a).*”

On the 2nd December, 1829, a letter was written by Mr. Howard to the plaintiff, commencing, “ My dear Garth,” informing him of two persons who had suits against him, but, not being willing to incarcerate him, had given notice of the fact. It concluded with these words—“ Therefore, if you are not off five minutes after this you will be caught.”

(a) The nature of the acquaintance between Captain Garth and Lady Astley may be gathered from

the case of *Astley v. Garth*, which was tried in the Court of Common Pleas.

Wilde, Serjt., applied for a nonsuit.—It is not like an action of trover, being an action for detaining the plate. The case assumed on the part of the plaintiff is, that Howard has pledged the plate with Fleming for a sum of 200*l*. Assuming for the moment that the action may be maintained against Howard, yet it cannot against Fleming. The common action of trover might be maintained, but not this.

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Spankie, Serjt.—It is in substance an action of trover, though not in form.

TINDAL, C. J.—I will reserve the point, and that will let in the other question, whether in this action there can be a verdict for one defendant and not the other.

Wilde, Serjt., then addressed the jury for the defendant Howard.—It must not be taken that the sum in the cash account, appearing to the credit of the plaintiff, was the absolute state of the account, but the state subject to the bills of costs which were running on, and any other transactions; for Howard was acting generally on behalf of the plaintiff, and not merely as his attorney. It appears that he discharged servants, and did various other acts. From the cash accounts, it appears that the plaintiff, having confidence in Howard, left him a general discretion. It is no matter whether Howard, mistaking the state of the account, pledged this plate. The plaintiff cannot now say the account turns out differently to what was supposed, and, therefore, I will deny that I gave you any authority. It is clear that the plaintiff was distressed for money; and whether there was a balance due to him or not, if Howard could not give him money, it would be necessary to raise it upon the plate. The circumstances of the case import an authority to Howard to raise money on the plate. The instance of the ring and dressing case, and the money sent to Lady Astley, or otherwise applied for the plaintiff's

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benefit, shew that there were similar dealings before. It is no matter whether Howard acted improperly or not. These two parties, Howard and the plaintiff, were distressed, and the authority to pledge is to be implied from the circumstances and documents in the case. And if so, the plaintiff has no right now, having had the benefit of the money, to turn round and bring a speculative action, and try to cheat the pawnbroker out of the money. Howard also had no control over the plate, he having pledged it with the pawnbroker.

Andrews, Serjt., for the defendant Fleming.—The transaction was clearly not one entered into by the defendant in his capacity of pawnbroker. It is evident, from the letters between the plaintiff and Howard, that there was a great intimacy between them; and Howard had pledged with Fleming for the plaintiff before; and Fleming had reason to conclude, as a man using reasonable caution, that Howard was clothed with authority to pledge this plate. He has advanced the 200%. What is there to shew that Howard had no authority, to rebut the presumptive evidence arising from the circumstances of the case? For what purpose was the plate delivered to Howard, except to be used to raise money, according to the necessities of the plaintiff, as they occurred? The question is, what was the understanding between the parties at a time when they were on friendly terms; not what is pretended, now they are at variance and Howard is unable to pay. Why was not a separate action brought against Howard? Or why was not the action brought against Fleming alone; and then he could have called Howard to explain the transaction. But it is an instance of cunning to shut the mouth of Howard. Why, if there is any thing in the present statement, did not the plaintiff immediately tell Fleming that he had not given the authority to pledge the plate? The statements of the shopman, in the absence of Fleming

at Paris, do not affect the case. Fleming has conducted himself with perfect good faith, and there is evidence in the case upon which you may say that he acted upon reasonable grounds as to the authority of Howard to pledge for the purpose of raising money.

No evidence was produced on the part of either of the defendants.

TINDAL, C. J., in summing up, said—This is an action to recover the value of some plate, which, as is alleged on the part of the plaintiff, the defendant Howard improperly, and without any authority, pledged with the defendant Fleming. The question is, whether the plaintiff did authorize Howard to pledge the plate; whether, without the evidence of direct authority, you, from the circumstances, can infer that there was an authority; for, if you can, you will find your verdict for the defendants. If you think that the plaintiff never authorized Howard to pledge the plate, or to hold himself out as a person having authority to deal with the property in such a way, then you will find for the plaintiff against Howard, on the ground that he acted without authority; and if so, then Fleming will also have acted without authority, and you will find your verdict against him also. There appears to have been a great intimacy between the plaintiff and Howard. We are to draw our attention particularly to the date of the 16th February, 1830, when the plate was pledged. It appears that, on the 2nd December, 1829, the plaintiff was in considerable pecuniary embarrassment, as a letter was written to him by Howard, commencing “My dear Garth,” and mentioning circumstances of a peculiar nature with regard to those embarrassments. The next transaction, in order of time, is one of the 18th January, 1830, when, it appears, a pledge was made with Fleming, through Howard, to raise money for the purposes of Lady Astley. It may be a question, whether the articles pledged were

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the property of Lady Astley; but still, whether they were or not, they were pledged through the instrumentality of Howard. It seems clear that the plate was obtained for the purpose of being used for the benefit of the plaintiff; and the question for you will be, whether it was obtained to be pledged under a specific authority, to be given in each individual case, or under a general authority to pledge for the purpose of raising money. There is a little difference as to the cases of the two defendants. If there was no authority at all to Howard, there is an end of the case, and a verdict must pass against both. But, if Howard had no specific authority, but the plaintiff had so held him out as his agent as to justify Fleming in dealing with him as such, then the plaintiff cannot have a verdict. For, if a man holds out another as his agent, in dealings with a particular person, he cannot object to the subsequent conduct of that person, unless he gives notice that he has revoked his authority.

His Lordship, at the desire of *Spankie*, Serjt., afterwards told the Jury, that, in the cash account, it did not appear that any advance of money was made to the plaintiff by Howard, after the time of the pledging.

Verdict for the defendants.



Feb. 14th.

HILL and Another v. PHILLIPS.

If the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family, cannot be served with a subpoena in consequence of the conduct of that family, the bill may be read without his evidence.

ASSUMPSIT on a bill of exchange against the defendant, as acceptor. There was a subscribing witness to the acceptance, whose name was George Phillips, one of the defendant's sons. He was not called; but, to account for his not being present, it was proved, on the part

of that family, the bill may be read without his evidence.

of the plaintiffs, that many attempts had been made to subpoena him, but without success. It appeared that he lived with his father, and, on applications at the house, at different hours of various days, answers were given sometimes that he was out of town, and sometimes that he was gone out for a walk. One witness stated, that, when told he was gone out for a walk, he watched the house for hours, but did not see him return. On one occasion, he watched from five in the morning till nine, and then inquired for him. The servant said, he had been gone out an hour. The witness said, it is impossible, for I have been watching since five. The servant replied, laughing, "He went out the back way this morning."

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Wilde, Serjt., for the plaintiff, referred to the cases of *Crosby v. Percy* (a), and *Burt v. Walker* (b), and contended, that it was evident the witness was kept out of the way; and, therefore, the bill might be read without calling him.

TINDAL, C. J.—I think you have hunted quite enough after George Phillips. It is evident they were keeping you at arm's length.

The bill was read, and eventually there was a—

Verdict for the plaintiffs.

(a) 1 Taunt. 364, and 1 Camp. 303. That case decides, that, "if, upon fair, serious, and diligent inquiry, without evasion, an attesting witness is not to be found, evidence of his handwriting is admissible, to prove the attestation."

(b) 4 B. & A. 697. According to this case, which was an action upon a bail bond, the clerk of the defendant was the subscribing witness, and, when he was subpoenaed, said, that he would not

attend, and the trial had been put off twice, in consequence of his absence. Search had also been made at the defendant's house, and in the neighbourhood; and, upon receiving information at the defendant's that the witness was gone to Margate, inquiry was there made without success. It was held, that, under these circumstances, evidence of his handwriting was admissible.

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Wilde, Serjt., and *R. V. Richards*, for the plaintiffs.

Erle, for the defendant.

[Attornies—*Baxendale & Co.*, and *Greenfield*.]

Feb. 14th.

ESSERY v. COBB.

The captain of a ship, who gives directions for repairs, is liable to the tradesman in the first instance, if it does not appear that any credit was given to the owners.

ASSUMPSIT for work and labour. Plea—The general issue.

The plaintiff was a ship-joiner, and the defendant was the captain, but had not any share, as owner, of a ship called the *Falcon*. It was proved that work was done to the ship to the amount of 28*l.* 5*s.*, and that the defendant was the only person who interfered in the matter, and that he gave directions for various alterations to be made.

Wilde, Serjt., for the defendant, upon this proof, admitted that the verdict must pass for the plaintiff.

TINDAL, C. J.—The captain is liable in the first instance, if it does not appear that any credit was given to the owners.

Verdict for the plaintiff—28*l.* 5*s.*

Taddy, Serjt., and *Payne*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*West & Morris*, and *Oliverson & Co.*]

See the case of *Thompson v. Finden*, Vol. 4 of these Reports, p. 158, which decides, that, "in an action against one of the owners for work done to a vessel, by the order of the ship's husband, such own-

er will be liable, unless it be shewn that the dealing was, that the person who directed the work to be done should be looked to *exclusively*." See also *Harrington v. Fry*, Vol. 1, p. 289, which decides, that "a

person is not liable for goods supplied for the use of a ship, unless he either is owner, or has held himself out as such, or has made an express promise to pay, or has received profit from the ship." And, in *Cox and Others v. Reid*, Id. 602, it was held, that "the re-

gistered owner of a ship is *prima facie* liable for goods furnished for the use of that ship; but such presumption of liability may be rebutted by evidence of the credit having been given to others." See also the next case of *Castle and Another v. Duke*.

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CASTLE and Another v. DUKE.

Feb. 18th.

ASSUMPSIT for work and labour in repairs done to the ship *Laurel of Shields*. The captain was called as a witness for the plaintiff.

Bompas, Serjt., for the defendant, produced a bill of the plaintiff's, headed "*The Captain and Owner of the Ship*," &c., and objected that the witness was incompetent, as he was himself liable.

TINDAL, C. J.—Generally speaking, the ship builder has a double claim: against the captain, if he employs him, or against any persons whom he may find out to be owners. I think that the witness is competent; but I will take a note of the objection.

The captain then proved, that the ship, having met with an accident, was taken to the plaintiff's dock; that he afterwards saw the defendant, who told him to have done whatever the surveyors ordered; adding, that the ship was insured, and he could not pay the dock bill until he had received the insurance. He further stated, that he told the plaintiffs what the defendant had said to him. A ship owner and publican, named Browne, was also called as a witness; he stated, that the defendant and the owner of the ship, Mr. Leslie, came together to his house, and the defendant asked him (Browne) whom he could recom-

If a person, who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel.

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mend to do the work; and he replied by recommending the plaintiffs; and the defendant thereupon told him to take the ship to them, and tell them' to do what was necessary, and no more; and also told him to get them to send the bill to him (Browne), that he might look it over on his behalf. It did not, however, appear that the witness told the plaintiffs what the defendant had said to him. Browne afterwards saw one of the plaintiffs, who told him, that if neither Leslie nor the defendant paid, they should look to him.

The register of the ship was put in, from which it appeared that Leslie was the sole owner, and the defendant mortgagee. The defendant had also acted as broker, and gave a receipt for the insurance, which was also put in.

Bompas, Serjt., for the defendant.—They call the captain, who is unquestionably liable if he gives the directions for what is done; and it does not appear that the work was done expressly for the owner. The defendant is not liable, either as mortgagee or as broker. It does not appear that Browne told the plaintiffs that Duke was the person who directed him to get the repairs done; and the account of the plaintiffs was sent to Browne. Leslie, the known owner of the vessel, was present at the time when Duke and Browne had the conversation. The ship broker is bound to give instructions to the captain as to the best dock, &c.; but, to make him personally liable, he must himself give orders to the party doing the work. Leslie has compounded with his creditors. The evidence only is of Duke's telling Browne to get the repairs done, but not of Castle's being informed of this by Browne. There is no evidence that Duke ever gave any orders at the dock. Both the captain and Browne come to discharge themselves. The 6th Geo. 4, c. 110, s. 45, provides, that where the mortgagee enters his mortgage on the register, he shall *not be deemed owner*. They do not shew that

Duke has charged. According to Browne's evidence, Castle said to him—"If Leslie does not pay, or Duke does not pay, I will make you pay." The receipt for the insurance has nothing to do with the case; as, if Duke was liable at all, he was so personally, and must pay, whether he received the insurance or not.

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TINDAL, C. J.—The question is, whether the defendant gave the directions for the work only in his character of broker; or as a person having an interest in the vessel. It appears that he stood in an ambiguous character: he was not only intrusted by the owner, but also had an interest of his own to protect.

Verdict for the plaintiff.

Wilde and Andrews, Serjts., and *Knowles*, for the plaintiff.

Bompas, Serjt., and *R. C. Nicholl*, for the defendant.

[Attornies—*Browne*, and *Willins*.]

See the preceding case of *Essery v. Cobb*, and the cases cited in the note to it.

HAY v. WEAKLEY.

Feb. 20th.

ACTION for maliciously suing out a commission of bankrupt against the plaintiff.

On the part of the plaintiff it was proved, that, in December, 1828, the defendant made an affidavit in the Mayor's Court of London, that the plaintiff was justly and truly indebted to him in 610*l.*, for money had and receiv-

In an action for maliciously suing out a commission of bankrupt, it is not sufficient to prove merely that the commission was superseded, as a *supersedeas* may proceed probable cause.

upon strict legal grounds, and does not, therefore, furnish evidence of the want of

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ed. Upon this, process issued, the plaintiff was arrested, and removed by *habeas corpus* to the King's Bench, where he continued till July, 1829, and was then discharged by an order of Mr. Justice *Bayley*. The affidavit on which the docquet was founded, was sworn by the defendant on the 31st of October, 1829. The commission was dated the 2nd of November, 1829. It was afterwards superseded by the Lord Chancellor. It appeared, also, that the plaintiff had been taken before a magistrate, and charged with felony, by a person named *Curis*; but the plaintiff failed to shew, by the witness he called, that the defendant, although he was proved to be present with his solicitor, then made the subject-matter of his claim the foundation of a criminal proceeding.

Merewether, Serjt., was addressing the jury for the defendant, when—

TINDAL, C. J., inquired, what evidence there was in the case of the want of probable cause?

Jones, Serjt.—There is the *supersedeas*. According to *Cotton v. James*, decided in the King's Bench (a), the slightest evidence, after a *supersedeas*, is sufficient to throw the burden of proof on the defendant. If a man swears against me, without having any real debt, what can I do to shew that there was not any?

TINDAL, C. J.—Supposing you had taken a step higher, and brought an action for maliciously holding to bail, would it be sufficient to prove that there was judgment as in case of a nonsuit? Or, in an action for malicious prosecution, why does not proof that the party was acquitted suffice? The *supersedeas* may have proceeded upon strict legal grounds.

(a) 1 Barn. & Ad. 128.

Jones, Serjt.—It was in fact treated as a question of felony. I trust your Lordship will allow the case to go to the jury.

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TINDAL, C. J.—I must tell the jury at last, that, although the facts are proved, they do not amount to what, in law, is a want of probable cause. But, as the defendant's counsel has partly addressed the jury, the case had better go on.

The case proceeded, and eventually there was a—

Verdict for the defendant.

Jones, Serjt., and Curwood, for the plaintiff.

Merewether, Serjt., and Hoggins, for the defendant.

[Attornies—*E. Isaacs,* and *R. Cole.*]

CORBETT and Another v. BROWN.

Feb. 25th.

CASE.—The declaration stated in substance, that the plaintiffs before, and at the time, &c., carried on the business of warehousemen, in London; and that on the 16th of April, 1830, one Henry Brown applied to them, and stated that he was about to commence business at Norwich, and had about 300*l.* capital, his own property, to commence business with, and requested them to sell him goods; and referred them to the defendant to corroborate his statement, of which the defendant, before the sale of the goods, had notice, and was requested to inform them, if the said Henry Brown had such capital or not; and that he, well knowing that he had not, falsely, fraudulently, and deceitfully informed them, in answer to these inquiries, that the statement, was perfectly correct, as he had advanced him

A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it.

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the money; in consequence of which, they were induced to give Henry Brown credit, and sold him goods to the amount, altogether, of 700*l.*, which remained unpaid, and which they were likely to lose. Plea—the general issue.

It appeared that the plaintiffs, who were wholesale haberdashers and general warehousemen, carrying on business in London, were applied to by the son of the defendant, who looked out goods to the amount of nearly 300*l.* Before they were sent to Norwich, where he stated he was about to begin business, he made a statement to the plaintiffs, and gave a reference to his father, in consequence of which the following letter was written by them to him:—

“London, April 16th, 1830.

“Sir,—Your son, Mr. Henry Brown, has purchased goods of us, and referred us to you, in order to corroborate his statement of having 300*l.* capital, his own property, to commence business with at Norwich. We require to know if such be the case. Any information you may please to give will oblige us, and which we shall be happy to apply in promoting your son's object, provided we can consistently do so. We shall be glad of an answer by return of post.”

The defendant, on the 17th, wrote the following reply.

“Gentlemen,—In reply to your letter of yesterday, I beg to acquaint you, that the statement made to you by my son Henry, as to the 300*l.*, is perfectly correct, as I advanced him the money, being the utmost I could spare at the present time, in consequence of having a numerous family. I hope that my son's dealings with you will always be as correct as the present statement.”

After the receipt of this letter the goods were sent. The plaintiffs, on the whole, supplied goods to the son to the amount of 1200*l.*, between the 16th of April and the

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4th of October, when he stopped payment, a bill for 240*l.* having become due that day. The practice of the plaintiffs' house, as to credit, was, that all goods supplied during the current month, from the 20th to the 20th, were drawn for at two months on the 1st of the succeeding month. The plaintiffs had always an account running with the defendant's son. The first month's supply was 290*l.* 9*s.* 1*d.*, which was settled by a cash payment of 100*l.*, and a bill for the remainder at three months. This extension from two to three months was an indulgence to him. The whole of the goods supplied during the first three months, amounting to 500*l.*, were paid for. A witness, in the employ of the plaintiffs, proved that it was not their practice ever to credit persons trading on a borrowed capital. A letter, dated the 26th of March, 1830, addressed by the defendant to his son, was put in: it inclosed (accepted) a bill for 200*l.*, which had been sent down to the defendant for acceptance, and contained this passage:—"If you prefer an additional 100*l.*, instead of security, I will, on receipt of your note for 300*l.*, send you another 100*l.* acceptance. Should you prefer the bill, instead of security, draw it yourself." Another letter from the same to the same, dated 14th of June, 1830, was put in; it contained this sentence:—"I also received 3*l.* and 15*s.* for a quarter's interest." On the 25th of October, 1830, a commission of bankrupt was issued against the son, on the petition of the plaintiffs, and his stock in trade was sold by private contract. It appeared that the defendant had not proved any debt under the commission; but the bankrupt had inserted the 300*l.* as a debt in his balance sheet.

Jones, Serjt., for the defendant.—In order to charge the defendant in this action, you must look, *First*, at the knowledge, the notion, the intentions of the father. *Secondly*, you must be satisfied that it was the father's letter, which induced the plaintiffs to trust the son; and *Thirdly*, that

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the loss was occasioned by their so trusting him. The words in their letter are, '*has purchased;*' not 'is about to open an account' to any particular amount. That the money had been advanced, in one sense of the word, has not been denied; and the charge of fraud depends on the construction of the word "advanced;"—on the meaning which the father had when he used it. But it is said that the father *received* interest; true, but is it proved that he ever *demand*ed it? The son might send him the interest to shew that he was going on well, and to induce him to make further advances. The question is, did the father, at the time he wrote the letter, ever intend to require the money from the son. If he had ever required it, this very letter would have furnished evidence against him. But 9s. 7d. in the pound has been received under the son's commission. No action was then brought, no application was then made. And why did not the father prove under the commission? His not doing so, shews that he did not consider himself a creditor of his son. It is said that the plaintiffs never commence business with persons on a borrowed credit. If they meant to make the defendant liable, they should have communicated that in their letter to him. They trusted the son in five months to the amount of 1200l.; this can have no reference to the 300l. capital. The property inquired about would be proportioned to the dealings in amount. Again, the dealings in the first month amount to 290l.; in three months, to 500l.; and every farthing of that is paid. Taking the letter to be a guarantie, which it is not, it would not be a guarantie for all time. In construction of common sense, the father cannot be considered the cause of the loss sustained by the plaintiffs. The loss was occasioned by their own negligence. They made the son a bankrupt.

TINDAL, C. J. (in summing up) said—The question, *first*, is, whether there was that false and fraudulent representation of which the plaintiffs complain: and, *secondly*, if

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there was, what is the damage which they have sustained in consequence of such false and fraudulent representation. The representation must not only be false, but false to the defendant's own knowledge. If he has made a representation which was untrue to his own knowledge, then he is answerable for the damage, which would naturally and properly flow from such representation. The goods it seems were looked out, but not delivered; they were still detained in the custody of the plaintiffs, and not delivered over so as to make them the property of the defendant's son. They were at liberty to waive the purchase or confirm it. You must ask yourselves this question, whether you think the object of the inquiry was sufficiently stated in the letter of the plaintiffs. If the letter of the defendant had stopped at the words "is perfectly correct," then the effect would have been in the words of the letter of inquiry; but it goes on with an explanatory statement, "as I advanced him the money." The first inquiry for you will be (putting these two letters together), whether the father intended to convey to the plaintiffs the idea that his son had 300*l.* his own property, in contradistinction to money lent. If you find this proposition in the affirmative, then you will go on to inquire, whether it was false, and, if false, whether it was so to the knowledge of the defendant. They put in two letters, written about a fortnight before the letter of inquiry, by the father to the son, for the purpose of shewing that the money was borrowed. [His Lordship read and commented upon the letters and then continued.] Do you or not feel yourselves justified in saying, that the negotiation for the loan was afterwards carried into effect; and that the 300*l.* was money borrowed, and not money given? Did the father understand the nature of the inquiry? and, if he did, did he intend to represent that the son had 300*l.* his own property? Then as to the damages, the verdict must be for such damage as is justly and immediately referable to the falsehood of the statement. The goods first pur-

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chased, to the amount of 500*l.*, have been paid for; but 600*l.* worth since have not, and the son was made a bankrupt by the plaintiffs in the month of October. You must say how much of this is justly and immediately referable to the false statement; that is a problem which you must solve for yourselves. I will only make one observation, and that is, if they gave the son an indiscreet and ill-judging credit, they cannot in fairness call upon the father to be answerable for the loss occasioned by it. It is not put to you as a guarantie which limits the amount; a guarantor is in a different situation, he has the money in his own pocket, and is called on for the first time; here the father has actually advanced the 300*l.* You will say, would the plaintiffs, without this letter, have trusted the young man at all? If the father had said, I have advanced him 300*l.* on his promissory note, would they have trusted him at all? They say, it is the practice of their house, never to trust a person who begins with a borrowed capital. You will consider, then, whether this representation was false to the defendant's knowledge, and then give your verdict for the damage immediately and necessarily consequential upon such false representation.

Verdict for the defendant (a).

Wilde, Serjt., and *J. H. Smith*, for the plaintiffs.

Jones, Serjt., and *Kelly*, for the defendant.

[Attornies—*Tilleard & M.*, and *J. S. Thompson*.]

(a) This was a new trial; the verdict on the former, which was also for the defendant, having been set aside as against evidence. The Court, on application for another

trial, refused to grant a rule, on the ground that two verdicts on such a question of fact were sufficient to settle the matter. See 1 Moore & Scott, 85.

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YATES v. DUFF.

Feb. 27th.

THIS was an action to recover damages from the defendant, for the breach of a verbal agreement, by which he engaged two cabins on board the ship *Sesostris*, on a voyage from England to Madras, for which he was to pay three hundred and fifty guineas. He refused to go, because the vessel, which was to have left the docks by the 10th of October, did not. There was contradictory evidence as to what took place when the bargain was made between the broker and the defendant, as to the importance to the latter of the vessel's sailing on the particular day specified. It was proved that it was the rule of the East India Trade, that, when a passenger refused to go, in consequence of delay in the sailing of the vessel, he was to forfeit half the amount of the passage-money agreed for. On the 3rd of October, the defendant wrote the following letter to the broker:—

Where a vessel, bound for the East Indies, is advertised to sail by a certain day, and does not, the ship-owner will be entitled to recover half the passage money of a person who refused to go, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable.

“ I have just been informed that the *Sesostris* will not sail from Portsmouth by the 15th instant. Is this to be the case? I beg a specific answer.”

To which the following answer was sent:—

“ Dear Sir,—In reply to your note, I beg to assure you, that the *Sesostris* will certainly leave Blackwall on the 10th, and Portsmouth on the 15th, of October, wind and weather permitting. This may be relied on, and you may make your arrangements accordingly.”

On the 10th of October, the defendant wrote a letter to the broker, commencing—“ I was much surprised to receive, on my arrival in Nicholas-lane, a message from you, that the *Sesostris* will not leave the docks until the

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13th, although your arrangement with me was for to-day. I have been induced, by the various postponements, to watch the ship," &c. It concluded by the defendant's declaring off the bargain, and adding, that he should look out for the first ship, and engage his passage in it. The defendant went by a ship called the Neptune. The Sesostris left the Docks on the 21st of October, and arrived at Portsmouth about the latter end of that month, but did not sail from thence till the 9th of November, being detained there by contrary winds.

Spankie, Serjt., for the defendant, contended that there was not, in point of law, any right to delay the sailing of the ship, according to the convenience of the owner; and that, under the circumstances, on the 10th of October, the contract between the parties was at an end.

Wilde, Serjt., for the plaintiff.—I do not mean to contend, that if there is a specific contract, of which time is the essence, that the parties will not be governed by it. But the present is not that case. The parties only spoke of time with a view to their forming some idea as to when they should get ready, but not to be precise as to the day. The defendant should have given notice, that, if the ship did not sail on the 10th, he would be off his bargain, instead of employing a person to watch. Where time is not of the essence of the contract, then it is to be performed in a reasonable time, and that will depend upon what were the intentions of the parties.

TINDAL, C. J.—There are two questions for your consideration in this case. The first is, whether the time of sailing formed an essential part of the contract? For, if it did, it has not been complied with. If, on the contrary, it was not a real and essential part, but only matter of representation while the matter was going on, then you will

consider, secondly, whether, under the circumstances, the ship sailed *within a reasonable time*. In this case, I should think, much will not turn upon the second point; for, if you assume that time was not an essential part, one would not say that a delay of about a week amounted to an unreasonable stoppage. The main question is, was there any understanding, at the time of the contract, that the ship was to sail positively by the 10th and the 15th? Was the 10th of October understood by the parties to be of the essence of the contract? This will depend upon the conflicting evidence. If you think time was not understood to be a part of the contract, then you will find for the plaintiff, unless you think the delay was unreasonable; and, if you find for the plaintiff, you will give half the passage money, which, it appears from the evidence, he is entitled to, under the circumstances.

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Verdict for the plaintiff—Damages, 175*l*.

Wilde, Serjt., and *Gambier*, for the plaintiff.

Spankie and *Andrews*, Serjts., for the defendant.

[Attornies—*Barendale & Co.*, and *Davis & R.*]

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*First Sitting at Westminster in Easter Term,
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BEFORE MR. JUSTICE BOSANQUET.

April 25th.

JAMES v. CAMPBELL.

If one of two persons fighting unintentionally strikes a third, he is answerable in an action for an assault, and the absence of intention can only be urged in mitigation of damages.

ASSAULT and battery. It appeared, that, at a parish dinner, the plaintiff and defendant (who it seemed were not on good terms, in consequence of something which took place with respect to a leet jury,) together with a Mr. Paxon and others were present. Mr. Paxon and the defendant quarrelled, and had proceeded to blows, in the course of which the defendant struck the plaintiff, and gave him two black eyes, and otherwise injured him. Afterwards Mr. Paxon wrote, and the defendant was desired to put his name to, the following paper:—

“ Frank Paxon having struck me, I returned the blow, but must, as I have been since informed, have struck Mr. James instead of Mr. Paxon, for which I am sorry.”

The defendant, upon this, said—“ I wont have that in; I'm not sorry, I will hunt the vagabond in all quarters.”

Bodkin, for the defendant, in his address to the jury, contended, that if the defendant did not intentionally strike the plaintiff, they ought to find their verdict for him.

Mr. Justice BOSANQUET (to the jury).—If you think, as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages.

Verdict for the plaintiff—Damages 10*l*.

Andrews, Serjt., and ———, for the plaintiff.

Bodkin, for the defendant.

[Attornies—*Allen & Co.*, and *Lovell*.]

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Second Sitting at Westminster in Easter Term,
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BEFORE MR. JUSTICE BOSANQUET.

WILSON v. COLLINS.

SLANDER. The plaintiff carried on business in Walbrook, and the defendant was ward beadle of Walbrook ward, and the words complained of were uttered in the plaintiff's shop in the presence of fourteen of the ward inquest, whom the defendant was attending in his official capacity. Some of them were addressed to the plaintiff, and some to the inquest. They were heard by an acquaintance of the plaintiff's, and other persons who were passing.

If a person has a communication to make to an inquest for their information, not on oath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest, and that he did it in a proper manner.

The words were—"The business going on here is a shameful one"—"He has been taken for kite-flying." "You are no better than a swindler, you are connected with rogues and vagabonds, and have taken this house as a receptacle for plunder—I will take care you shall not remain."

Andrews, Serjt., for the defendant, contended, that this was not that utterance of wilful and malicious slander, which was necessary to maintain the action. If the defendant did not speak louder than was requisite to inform

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the jury, it must be considered as a confidential communication.

Mr. Justice BOSANQUET, in summing up, said—It is suggested in this case, that, notwithstanding the words have been proved, the plaintiff is not entitled to a verdict, because they were uttered under circumstances which sufficiently justify the utterance. If a person has to make a communication to an inquest, he is bound to do it in such a manner as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest when assembled, and was doing it in a proper manner. In the first place, there is very imperfect evidence of the assembling of the inquest; but it seems that some of the conversation was addressed to the plaintiff himself in the back part of the premises, and in such a tone as to call the attention of the passers-by to it. It does not appear that any of the inquest asked any questions about the matter, and the defendant had no right to act officiously in making the communication. If you think that the act was not done by him in the discharge of his official duty, then you will say to what damages you think the plaintiff is entitled.

Verdict for the plaintiff—Damages 20*l*.

Wilde, Serjt., and *Steer*, for the plaintiff.

Andrews, Serjt., and *Comyn*, for the defendant.

[Attornies—*E. W. Smith*, and *W. Richardson*.]

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First Sitting in London in Trinity Term, 1832.

BEFORE MR. JUSTICE ALDERSON.

PLUCKWELL v. WILSON, Bart.

May 31st.

ACTION for an injury done to the plaintiff's chaise by a carriage of the defendant's, driven by his servant. There was contradictory evidence as to the cause of the injury, and also as to whether the defendant's carriage was in the centre, or on its proper side, of the road.

A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road.

Mr. Justice ALDERSON left it to the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant, without *any* negligence on the part of the plaintiff himself; for that, if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict. Also, they would have to say, whether it was altogether an accident; in which case also the defendant would be entitled to the verdict. His Lordship also observed, that a person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better look-out, that he might avoid any concussion, than would be requisite if he were to confine himself to his proper side of the road.

Verdict for the plaintiff—Damages, 25*l*.*Andrews*, Serjt., and *Thesiger*, for the plaintiff.*Scriven*, Serjt., and *Ryland*, for the defendant.[Attornies—*Wilks*, and *Liddon*.]

See the cases of *Wakeman v. Robinson*, 8 J. B. Moore, 63, and 1 Bing. 213; *Chaplin v. Hawes* and others, Vol. 3 of these Reports, p. 554; and *Lack v. Seward*, Vol. 4, p. 106.

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Sitting in London after Trinity Term, 1832.

BEFORE LORD CHIEF JUSTICE TINDAL.

June 19th.

PUGH v. HOOKHAM.

If an insolvent debtor knows, at the time of filing his schedule, that a bill of exchange had been indorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule.

ASSUMPSIT by the plaintiff, as holder of a bill of exchange, drawn by one Kedge, on, and accepted by, the defendant, and made payable to the order of the drawer. There was no plea of the general issue, but only a plea of a discharge, under the Insolvent Debtors' Act, on which issue was taken.

The bill was inserted in the defendant's schedule as held by the drawer himself. No evidence was given by the defendant (who began, as the affirmative of the issue was on him) to shew, under the 46th section of the Insolvent Debtors' Act (*a*), that the plaintiff was not known to the defendant, as the holder of the bill, at the time when he made out his schedule. But, on the part of the plaintiff, it was proved, that on the arrest of a person for whom the defendant proposed to become bail, a conversation took place, in the presence of the defendant, in the course of which Pugh's name was several times mentioned as the holder of the bill in question. This was at a time when the bill had several months to run, and some time before the filing of the schedule.

Bompas, Serjt., for the plaintiff, submitted that, as the defendant once knew the fact, he ought not to have neglected to insert it at the proper time. He contended,

(*a*) 7 Geo. 4, c 57; that section declares, *inter alia*, that a prisoner shall be discharged, as to the debts of creditors named in the schedule, and as to the claims of all

other persons *not known* to such prisoner at the time of adjudication, who may be *indorsees, or holders for value of any negotiable security* set forth in his schedule.

also, that the defendant was bound to give some evidence to shew that he was not aware of the plaintiff's being the holder of the bill at the time when he made out his schedule.

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TINDAL, C. J., said he would reserve the point as to whether the defendant was bound to give affirmative evidence; but added, that, in his opinion, if it was proved that he knew at one time that the plaintiff was the holder of the bill, he ought to have inserted his name in the schedule.

Andrews, Serjt., for the defendant.—Although the bill was once in Pugh's hands, yet it had some months to run, and there was no knowing into whose hands it might get before it came to maturity. I submit that it could not be the intention of the legislature that a man in prison should be obliged to make inquiries after a bill. The only object was to procure an insertion of the name of the person who was the creditor at the time of filing the schedule. The 40th section requires, that the prisoner shall give a list of such creditors as were within his knowledge at the time he filed his petition (a). But the 46th section seems to provide expressly for this very case, as the bill may have passed through many hands after the time when it was known to be in the hands of the plaintiff. There is no fraud in this case on the part of the defendant.

TINDAL, C. J., (to the jury).—The only question for you is, whether the defendant has given that notice which, by the Insolvent Debtors' Act, he was required to give? It seems to me that the whole scheme of the Insolvent

(a) The words are—"a full and true description of all debts due, or growing due, from such prisoner, at the time of filing such petition; and of all and every person and persons to whom such prisoner shall be indebted, or who to his or her knowledge or belief shall claim to be his or her creditors."

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Debtors' Act is, that notice should be given to the parties, and the world, of the names of the creditors, and the amounts of the debts. But there are cases of outstanding securities, as to which a party may not know in whose hands they are. The 46th section says, "shall be discharged as to the claims of all other persons not known to such prisoner," &c. The question is, whether the defendant knew at the time that Pugh was an indorsee of the bill? If he did, then he was bound to give notice to him.

Andrews, Serjt., submitted, that the 46th section must be referable to the holder at the time when the schedule was filed.

TINDAL, C. J.—On the construction of that section, I think, that, if a man knows, at the time of filing his schedule, that a bill has been indorsed to a particular person, he is bound to give notice to that person, although he cannot tell whether he continues to be the holder at the time of the filing of the schedule. This appears to me to be the proper construction of the act.

Verdict for the plaintiff.

Bompas, Serjt., and *Manning*, for the plaintiff.

Andrews, Serjt., and *Hutchinson*, for the defendant.

[Attornies—*Dover & L.*, and *Walls*.]

See the case of *Nias v. Nicholson*, Vol. 2 of these Reports, p. 120, and the cases there referred to.

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Adjourned Sittings at Westminster after Trinity Term, 1832.

BEFORE LORD CHIEF JUSTICE TINDAL.

BENNETT *v.* ROBINS.

June 20th.

REPLEVIN.—The defendant made cognizance, as the bailiff of a person named Broom, who was a receiver appointed by the Court of Chancery.

A receiver, appointed by the Court of Chancery, has a right to distrain for rent, without any special authority from the Court for that purpose.

Bompas, Serjt., for the defendant, objected that, without special authority from the Court of Chancery, a receiver had no right to distrain for rent.

Wilde, Serjt.—There is a case in *Atkins* which decides that he may (a).

TINDAL, C. J.—I think there is no foundation for this objection. I think that a receiver, appointed by the Court of Chancery, must be considered, in point of law, as having a right of distress; otherwise the right to receive would be a perfect mockery; for, when the Court was not

(a) *Pitt v. Snowden*, 3 Atk. 750. In that case Lord *Hardwicke* said, that receivers have a power, where they see it necessary, to distrain for rent, and need not apply first to the Court of Chancery for a particular order for that purpose; and that he had often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premises in the mean time; for the Court ne-

ver makes an immediate order for a distress, but allows, on such applications, a future day for the tenant to pay. His Lordship added, that, if there should be any doubt who had a legal right to the rent, then the receiver, as he must distrain in the name of the person who has that right, would, very properly, make an application to the Court for an order.

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sitting, and no order could be made, a tenant might remove his goods, and the rent could not be recovered. And, if this be so, then the allegation on this record is, that the rent was due to Broom, which is admitted, and he, being the receiver, and having the right to appoint a bailiff to distrain, has appointed the defendant Robins to recover the rent for him. I think, therefore, the plea is made out.

Verdict for the defendant.

Bompas, Serjt., and *Tomlinson*, for the plaintiff.

Wilde, Serjt., and *Blackburn*, for the defendant.

[Attornies—*Harmer*, and *Patten & Son*.]

Adjourned Sitings, in London, after Trinity Term, 1832.

BEFORE MR. JUSTICE GASELEE,
(*Who sat for the Lord Chief Justice.*)

June 30th.

COLEPEPPER v. GOOD.

If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the booking office keeper.

In an action against the carrier, the person at the booking office who delivered the goods to the carrier, is a

competent witness to prove the state in which they were delivered.

ACTION to recover damages for the loss of a chest, containing clothes, &c., and a hammock which was fastened outside. The plaintiff was second mate of the *Sir Charles Forbes*, East Indiaman, and on his arrival in London, his sea-chest was taken from the Custom-house to the *White Hart* public-house, Tower-street, and booked there. There was a direction on a card fastened securely to the chest with a piece of string. It was, "Mr. F. Colepepper, Bromley Hall Cottages, Bromley, near Bow." The plain-

tiff's father, who proved these facts, stated that the chest never arrived. The person at the booking office was called to shew that he had delivered the chest to the carrier.

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Bompas, Serjt., for the defendant, objected that the witness was interested, and could not be examined without a release. The verdict would be evidence against him, if the loss was occasioned by his negligence and not that of the defendant.

Wilde, Serjt.—He is a witness of necessity. It is similar to the case of clerks receiving money for their employers, and sub-agents, who are always admitted without a release. He is the defendant's agent.

GASELEE, J.—I think he is a good witness.

The witness then proved the delivery of the chest to the defendant's man; and it was also proved that the defendant had said he was very sorry for the loss; that he was with his man in the cart at the time; and that he had delivered the chest at the Three Mackerel, in the Mile-end Road. It appeared that at the booking-office parcels were received to go by various carriers, and they were all entered in one book.

Bompas, Serjt., for the defendant, contended that the booking-office keeper, taking in goods for a variety of places, and keeping but one book for all, was not the servant of the carrier; and the carrier was not answerable for any negligence occurring at the booking office. But if he delivered the goods according to the direction, he did all that the law required of him.

He called, on the part of the defendant, the man that was with the cart; who stated that he had been the ser-

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vant of the defendant for seven years, during which time the cart had been in the habit of calling daily at the booking office; that he took the chest up there, and put it on what is called the tail ladder of the cart; that he looked at the direction and read it.—It was, “ Mr. Chaplin, to be left at the Three Mackerel, Mile-end Road, till called for;” that he took it off and put it in his pocket, for fear it should be torn off, as the chest was on the outside of the cart; that he delivered the chest at the Three Mackerel to the landlord, with the direction, and had never seen or heard of it since. On his cross-examination, he admitted that he had been charged with stealing it, and had been tried for it, but was acquitted.

The landlord of the Three Mackerel proved, that, before the arrival of the cart, two men came into the house and called for a pint of porter; one of them, pointing to the other, said, “ My brother is just come from sea, and there is a chest and hammock left at the White Hart, in Tower-street, to be brought here, directed in the name of Chaplin.” They gave the landlord half-a-crown to pay the carriage, and said they should be much obliged to him if he would take in the chest when it came, and they would call for it. He accordingly received it with the direction from the defendant’s man. The direction he received, was “ Mr. Chaplin, to be left at the Three Mackerel, Mile-end Road, till called for.”

The person from the booking office was called up, and, in answer to a question from the jury, swore distinctly that he told the carrier’s man that there was a chest for Mr. Colepepper, at Bromley Hall Cottages.

On the part of the defendant, the case of *Dover v. Mills* (a), was referred to as an authority to shew that the booking-office keeper was answerable for negligence occurring while the goods were in his custody; and there-

(a) *Ante*, p. 175.

fore that he could not be considered as the agent or servant of the carrier.

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Wilde, Serjt., for the plaintiff.—There is no doubt that the booking-office keeper is, in law, the agent of the carrier; and where the carrier (as in this case) has been in the habit of using the same house for several years, it must be taken that in fact he was so. The public would be in a very bad situation if a contrary doctrine were maintained. The booking office is the warehouse of the carrier, as he appoints things to be taken in there.

GASELEE, J. (in summing up), said—There are two questions, in my opinion, in this case for your consideration. The first question is, whether the booking office keeper was or was not the agent or servant of the defendant; for, if he was, then the defendant will be liable to answer for his negligence: but, if he was not, there might be some question as to whether he is or is not liable in point of law. But, whether he was the agent or not, there is another and most material question, viz. whether the direction was altered before the goods were delivered to the carrier's man, or not. On the first question, as to the agency, it is important to consider that neither party has produced any card of the carrier's. It is not possible to say, whether the plaintiff could easily produce the defendant's card or not; but it is clear that the defendant could easily have produced his own card: but it seems that the defendant's cart has been in the habit of calling for goods at the house in question. If a carrier has directed goods to be sent to a particular place, I think that the party sending them has, in point of law, a remedy against him for any misconduct on the part of the booking office keeper. And it will be for you to say, whether in this case the course of conduct of the carrier, calling from day to day for seven years, does or does not satisfy your minds, that the booking-office keeper was his agent. If you

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think it does satisfy your minds, then there is an end of this case, so far as the verdict is concerned. With respect to the case cited, I agree, that where a booking-office keeper has misconducted himself, the party injured may maintain an action against him; but it does not follow that he may not also maintain an action against the carrier.

The jury said, that they thought the booking-office keeper was the agent of the defendant; and also that the direction was right when the chest was delivered to the carrier, and found a—

Verdict for the plaintiff.—Damages, £39.

Wilde, Serjt. and *Cottingham*, for the plaintiff.

Bompas, Serjt. and *Payne*, for the defendant.

[Attornies—*Baddeleys*, and *Harmer*.]

See, in addition to the case cited, those of *Newborn v. Just*, Vol. 2 of these Reports, p. 76; *Upston v. Slark*, Id. p. 598; and *But-*

ler v. Basing, Id. p. 613. See also the stat. 11 Geo. 4 & 1 Will. 4, c. 68, s. 5, set forth *ante*, p. 245.

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BEFORE LORD CHIEF JUSTICE TINDAL.

ELTON v. LARKINS.

July 12th.

ASSUMPSIT on a policy of insurance on the ship *Fanny*. This was a new trial of the case reported, *ante*, page 86. The main question on both occasions was, whether or no there had been a concealment, at the time of effecting the insurance, of material facts in the knowledge of the assured. This depended upon whether the *Fanny* at the time was a missing ship (a).

On the part of the plaintiff, in addition to similar evidence as on the last trial, ten witnesses acquainted with the trade with Cadiz stated that they should not have considered the *Fanny*, under the circumstances, as a miss-

In a question of marine insurance, a material concealment is a concealment of facts which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium; and a letter containing facts,

which, if communicated, would lead to inquiry, which would produce important information, ought to be shewn by the assured to the underwriter.

A party is not bound, at the time of effecting a policy, to communicate the time of sailing of the ship, unless at that time it is a missing ship; neither is he bound to communicate any knowledge he may have of the time of sailing of another vessel from the same place, either before or at the same time as his own, unless he knows of something particular having happened to such other vessel, which might affect the insurance of his own.

A witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion; as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause.

Written admissions made for the purpose of a former trial may be used on a new trial. If the party who made them wishes to withdraw them, he should take out a summons before a Judge, in order to obtain his permission.

Where material facts are known to the assured at the time of effecting a policy, he is bound to communicate them; and the circumstance of their being contained in what are called Lloyd's Lists, which the underwriter has the power of inspecting, will not dispense with the necessity of such communication.

(a) The rule for a new trial was made absolute, on the ground that it was uncertain whether the jury founded their verdict upon an opinion that the facts withheld were not material, or upon an opinion that they were material, but that the defendant might have discovered them himself by examining the books at Lloyd's, and, therefore,

the communication of them was unnecessary. The Court said, that they would not have disturbed the verdict could they have been sure that it was founded upon the first ground, but were dissatisfied with it if it proceeded upon the second. See 1 Moore & Scott, 323, reported also in 8 Bing. 198.

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ing ship on the 29th of December, 1828, when the insurance was effected; because the wind was so variable, that a vessel starting early might get driven out of its course, and not get in again for some time, while a vessel that sailed late might pursue its course direct, and so arrive in England first.

To prove some of the facts of the plaintiff's case, certain written admissions, which had been made for the purposes of the former trial, were tendered in evidence, and objected to on the part of the defendant.

TINDAL, C. J.—If a defendant desires that admissions made on a former should not be used on a new trial, he should take out a summons before a Judge, to obtain permission to withdraw them; for, the former trial is deemed as no trial, and the new trial, being of the same cause, is therefore, unless such course is pursued, subject to the same admissions.

Spankie, Serjt., for the defendant.—An underwriter making a contract is entitled, especially in cases where the voyage is uncertain, to have all the information which the party making the insurance is in possession of at the time, and it is not necessary for him to ask questions in order to obtain it. The question is, whether the facts in the knowledge of the plaintiff, from the letter he received from his captain, would, if communicated, have prevented the defendant, or any other underwriter, from insuring at the rate in question. If the letter had been communicated, attention would have been directed to the Traveller, about which accounts had been received at Lloyd's—its communication would have given rise to inquiry. The underwriter would not then have speculated on bare probabilities. It does not follow that he would have declined the insurance, but he would have required a larger premium. This shews that the contents of the letter were material. The fact also, that the plaintiff kept the letter in his pocket for twenty days, shews that he was endea-

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vouring to bear his own insurance, and only sought to get a policy effected when he began to think that there was danger. He had no right after this to treat it as a common case of ordinary risk. The case of *Bridges v. Hunter* (a) shews what was considered material. In that case, the policy was effected on the 12th of November, and two letters received on the 31st of October were not communicated: one of them was dated the 11th of October, and contained the words, "who *pretends* to sail after to-morrow;" the other was dated the 13th, and inclosed the bills of lading, which contained the words, "with convoy." Lord *Ellenborough* told the jury, "that the question was, whether a disclosure of these letters would probably have varied the judgment of the underwriter so as to have induced him either to decline subscribing the policy or to demand a higher premium." The jury found for the plaintiffs, but a new trial was granted, and Lord *Ellenborough*, in his judgment on the motion, said that if the letter of the 13th had been communicated, the defendant would have learned that the ship was to sail with convoy, and "he might then have referred to the convoy list at Lloyd's, and would have there found that the convoy had arrived without her." And so in this case, I contend, that, if the letter in question had been communicated, the defendant would have referred to Lloyd's, and would there have discovered material and important information. *Kirby v. Smith* (b) and *Richards v. Murdock* (c) are also cases in point, as tending to shew that circumstances are material, which, if communicated, would lead to inquiry. It is said, on the

(a) 1 Mau. & Selw. 15.

(b) 1 Barn. & Ad. 672. That case decides, that, where a ship had sailed from *Elsineur* on her voyage home *six hours* before the owner, who followed in another vessel on the same day, and, having met with rough weather on his passage, arrived first, and then caused an in-

surance to be effected on his own ship, these circumstances were material to be communicated to the underwriter; and that it was not sufficient to state merely that the ship insured was "*all well at Elsineur*" on the day of her sailing.

(c) 10 Barn. & Cress. 540.

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other side (in addition to the evidence of the ship's not being considered out of time), that the defendant might have looked at Lloyd's lists. But the underwriters only look at Lloyd's books, and the lists are merely the raw materials from which the books are made up. An underwriter could not carry on his business if he were bound to look at the lists for all ships, without any clue being furnished him as to a particular ship. I submit, that an underwriter is not bound to go and look at Lloyd's for information which the party making the insurance is in a situation to communicate. It would lead to the foulest frauds if it were otherwise.

On the part of the defendant, in addition to the evidence of the broker, and the entries in the books at Lloyd's (*a*), it was proved that the wind was favourable from the 21st of November to the 23rd of December.

Witnesses were also called with reference to the materiality of the letter, and the practice at Lloyd's with respect to the books and lists.

The first was named Secretan, he said—"There is a book at Lloyd's containing an account of accidents, arrivals, &c., and there are also lists containing other information. I should not search the lists for ships in which I was not interested. When you have a ship it is usual to consult the lists, but not otherwise."

Spankie, Serjt., read to him the letter from the captain of the *Fanny* to the plaintiff (*b*), and asked him, whether, if an insurance had been offered him on the 29th of December, he should have considered that letter material to

(*a*) See *ante*, p. 86, in the report of the former trial.

(*b*) The material part of the letter was, "I have now to inform you, that the last boat from —— & Son is now alongside, which com-

pletes the cargo; and I am in great hopes to sail from here to-morrow, or Sunday morning the 23rd. One vessel sails to-morrow direct for London, the schooner *Traveller*, having been detained thirty days."

be communicated at that time. He replied—"If I knew that the Traveller had been towed into Kinsale on the 15th, I would not have written the policy at all. If I had known that the letter had been received on the 9th of December, I should have thought on that ground it was material to be communicated on the 29th. After a communication kept back for twenty days I would not have done the insurance at all."

Another witness, named Brown, a director of the Royal Exchange Assurance Company, said that he was in the habit of frequenting Lloyd's daily; that he considered the letter material; that, if he had been told that the Traveller was in distress, he would not, on the 29th, have written the Fanny at 30*s.*; and that, after the concealment of the letter he would not have taken the risk at any premium. He added—"It is not usual to examine Lloyd's books unless some fact is brought to the underwriter's notice which makes it material that he should examine them." On his cross-examination he said—"If the letter had been shewn me on the 10th, and not kept back, the circumstance of the Traveller having *sailed* on the same day being in the letter, would not have induced me to make any search about it. If the towing into Kinsale had been mentioned in the letter, I should have inquired further."

Another witness, named Ellice, said—"It is only the practice to refer to the lists if there is any thing peculiar. If nothing was said about the time of sailing, I should ask an ordinary premium, on the supposition that nothing was known about it; but, if I had been told what the time of sailing was, I would not have taken it."

Another witness, named Robinson, a merchant and underwriter, said—"I think the letter should have been communicated, from the circumstance of its being received so long before the insurance. If it had not been kept back I should hardly think it was material. Most probably I should not have effected the insurance, I should have said the party has been running his own insurance, and should,

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at all events, have asked some explanation. I should have asked what had become of the Traveller."

Mr. Willis, who was at the time foreman of the Special Jury in a cause in the King's Bench, was allowed by Lord *Tenterden*, C. J., to leave the jury box, and come into the Common Pleas to be examined. He said—"If attention is directed to the lists, it is usual to make inquiry, otherwise not. Some do, by way of curiosity. If a letter had been received on the 9th, it would, if I knew it on the 29th, have influenced me. I undoubtedly think the letter in question was material. It is my practice, in an extensive connection as a broker, to communicate all information as to the time of sailing."

The broker, who swore that he had not told the defendant the time of sailing of the *Fanny*, had been asked whether he had not said, some time after the policy was effected, that the underwriters had not a leg to stand on. He denied it, and—

Wilde, Serjt., proposed to call a witness to prove that he had so said.

Spankie, Serjt., objected.—This is to a collateral matter.

Wilde, Serjt.—It is direct to the issue. The broker's declarations, as to his opinion of the claim of the underwriters, may be important to shew what facts he communicated or kept back from them, that being the real question in the cause.

Spankie, Serjt.—The inquiry touching what the broker said at a time long after the risk, cannot be material to the issue. The broker's answer must be taken, and he cannot be contradicted.

TINDAL, C. J.—It seems to me hardly to come within the rule relating to a matter directly connected with the

issue. If there had been any contradiction of the broker's assertion of a matter of fact, as to whether he had or had not made the communication, it might have been received. But this is only a contradiction on a matter of judgment, and I think it is not receivable.

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Wilde, Serjt., in reply.—Lord *Mansfield's* objection to the evidence of underwriters as to materiality, *viz.* that it is matter of judgment founded upon the same facts upon which the Judge and jury are to give their judgment, still exists, though the evidence has somehow or other crept in, and is now allowed to be received. The assured is not bound to communicate the time of sailing of the ship, unless it is what is technically called out of time, that is, beyond the period during which the voyage is performed, not taking any extraordinary voyage. Nor is he bound to communicate any thing not connected with the subject-matter of the insurance. The plaintiff would read of the Traveller as he would of Noah's Ark. And he knew nothing at all about the William. The rule as to a missing ship is not taken from the average length of the voyage, but a missing ship is one not heard of after the longest ordinary safe time in which the voyage is performed. The plaintiff's witnesses all deny, that, under the circumstances, the Fanny could be considered a missing ship. Increase of risk and increase of premium would not be considered or required, unless the ship was out of time. *Bridges v. Hunter* shews that the time of sailing is not material, unless the ship was a missing ship. As to the other cases cited, the one where a letter was kept back was a case of deliberate waiting on a previous arrangement. And in the other, the words were, "all safe at Elsineur on the 26th," when in fact the ship left before, and the assured must have known something about her. It is clear that the broker knew the time of sailing: did he or did he not conceal it from the underwriter? Why should he not communicate


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it? It is very hard if underwriters are to object without making inquiries. We cannot suppose that they would not make them, and, therefore, may assume that the facts were communicated. The circumstance of the facts being contained in Lloyd's lists rebuts all idea of an intention to conceal. The question is, whether a ship from Cadiz, after thirty-three days, is out of time. If not, then the letter was not material at all.

TINDAL, C. J., in summing up, said—The question is, whether there has been a material concealment of facts which the plaintiff knew, and which the underwriter would require to enable him to decide. A material concealment is a concealment of facts, which, if communicated to the party who underwrites, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium. The question, therefore, is, whether this letter was one that contained facts which were material and important in order to enable the underwriter to form his conclusion on the subject.

On the part of the defendant, it is said, that there are three reasons why it is material—*first*, that it mentions the time of sailing of the Fanny—*secondly*, that it mentions also the time of sailing of the Traveller. It is said that it would have induced the underwriter to look into the books at Lloyd's, where he would have found that the Traveller, on the 15th of December, had been towed into Kinsale. The *third* ground is, that the bare keeping the letter so long without communicating it, was of itself sufficient to render it important to the underwriter. But it seems to me that this *third* ground depends upon the *first*, whether it was a material letter or not, and that it is only reasoning in a circle. The law clearly is, that a party is not bound to communicate the time of sailing of a ship, unless at the time of effecting the policy the ship is what is called a

missing ship. If the underwriter inquires, and a false answer is given, that will vitiate the policy, but it is not generally necessary *a priori* that the assured should communicate the time of sailing. It is a question entirely for your consideration, whether this ship, the Fanny, on the 29th of December, was what could fairly be called a missing ship: had she been so long on the voyage that the owner had reason to suspect that she was out of time? As to the objection on the ground of the Traveller, it seems to me that the plaintiff was not bound to communicate the time of sailing of the Traveller, unless there was some fact within his knowledge of something having happened to that ship. There is no evidence that the plaintiff knew of the fact of the Traveller's having been towed into Kinsale at the time when he effected the insurance. It seems to me, therefore, that it comes round to this single and simple question—Whether the Fanny was a missing ship or not.

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Verdict for the plaintiff—Damages 100%.

Wilde, Serjt., and *Maule*, for the plaintiff.

Spankie, Serjt., and *Barnewall*, for the defendant.

[Attornies—*Oliverson & Co.*, and *Blunt & Co.*]

1832.

COURT OF EXCHEQUER.

Third Sitting in London in Easter Term, 1832.

BEFORE MR. BARON GURNEY.

April 30th.

HOUSEMAN v. FELICIA ROBERTS.

A notice to produce served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late.

Notices to produce ought to be served on the attorney, if there be one.

USE and occupation. Plea—General issue.

This was an undefended cause, and it appeared that notice to produce a receipt had been served on the defendant, at her lodgings in Berners-street, on Saturday the 28th of April, the cause coming on for trial on Monday the 30th.

Mr. Baron GURNEY.—This notice is not sufficient. It is too late; and, besides, notices to produce ought to be served on the attorney, if there be one.

The plaintiff proved his case by other evidence.

Verdict for the plaintiff.

Chilton, for the plaintiff.

[Attornies—*Ness*, and *George*.]

See the case of *Hargest v. Fothergill*, ante, p. 303.

1832.

First Sitting in London in Trinity Term, 1832.

BEFORE MR. BARON GURNEY.

NICHOLSON and Another v. PAGET.

June 1st.

ASSUMPSIT on the following guarantie:—

“ 184, Piccadilly, 25th May, 1830.

“ Mr. Nicholson;

“ Sir,—I hereby agree to be answerable for the payment of 50*l.* for Thomas Lerigo. In case Thomas Lerigo does not pay for the gin, &c. he receives from you, I will pay you the amount. I am, Sir, your most obedient servant,

“ Richard Paget.”

A person gave a guarantie in these words, “ I hereby agree to be answerable for the payment of 50*l.* for T. L. In case T. L. does not pay for the gin, &c. he receives from you, I will pay you the amount:”—
Held, that it was not a continuing guarantie.

It appeared that the plaintiffs, who were spirit-merchants, had supplied Lerigo, between the 26th of May, 1830, and the month of June, 1831, with spirits to the amount altogether of 270*l.* 10*s.*, but not in any one supply to the amount of 50*l.*, and that 31*l.* 18*s.* was the balance remaining unpaid. It was proved that the defendant came to the plaintiffs' counting house, after application had been made to him for the money, and said that it was a hard case, and that somebody had called from the plaintiffs and offered to take 15*l.*; upon which one of the plaintiffs told him that no person had any authority of that kind, but that he was willing to take 25*l.*

GURNEY, B.—You cannot explain the written agreement by a verbal conversation.

Lloyd, for the defendant, applied for a nonsuit, con-

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tending, that it was not a continuing guarantie. He cited *Melville v. Hayden* (a).

Godson, for the plaintiff.—It is a continuing guarantie. In *Mason v. Pritchard* (b), the Court say that the words are to be taken as strongly against the party using them as their meaning will warrant. And it is just that a man should be held liable, unless in words he expressly limits his responsibility.

Lloyd.—*Melville v. Hayden* goes to shew that it is not incumbent on the party to limit his liability by express terms. It was held there to be no continuing guarantie as in *Mason v. Pritchard*.

GURNEY, B.—I am of opinion that this is not a continuing guarantie; I think that the whole must be taken together, and I do not consider it correct to take the two sentences separately. And if it is not a continuing guarantie, then I think that the defendant's understanding on the subject arising from the conversation will not alter it. I shall, therefore, nonsuit the plaintiffs, giving leave for a motion to enter a verdict for them, if the Court shall think that I am wrong in my decision.

Ludlow, Serjt., for the plaintiffs, submitted, that the defendant's offer to pay should go to the jury, to be found by them as a fact which might be in aid of the construction contended for, as shewing that he knew that goods had been supplied since, and had offered to pay some money.

GURNEY, B.—You cannot construe an instrument made in one year by a conversation occurring in another year.

Nonsuit, with leave, &c.

(a) 3 Barn. & Ald. 593.

(b) 12 East, 227.

Ludlow, Serjt., and *Godson*, for the plaintiffs.

J. H. Lloyd, for the defendant.

[Attornies—*Scargill*, and *Smith*.]

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IN the course of the term, a rule *nisi* was obtained, which came on to be argued in the following Michaelmas Term, and was then—

Discharged (a).

(a) See 1 Crompton & Meeson, 48. See also the cases of *Merle v. Wells*, 2 Camp. 413; *Warrington v. Furber*, 6 Esp. 89, and 8 East, 242; *Rains v. Storry*, Vol. 3 of these Reports, p. 130; *Walton v. Dodson*, Id. 162; *Newbery v. Armstrong*, Vol. 4, p. 59; and *Kay v. Groves*, Id. 72.

Adjourned Sittings at Westminster after Trinity Term, 1832.

BEFORE LORD LYNTHURST, C. B.

BLEW v. WYATT and Another.

June 20th.

ASSUMPSIT on the following instrument, signed by the two defendants, John Wyatt and Henry Early Wyatt:—

“ London, December 26, 1827.

“ We acknowledge to have received from Mr. Blew the sum of 500*l.* on the — day of —, and the sum of 150*l.* on the — day of —, making together 650*l.*, for which we agree to allow 5*l. per cent.*”

A clerk in a house lent money to the partnership composing it, two of them signed an acknowledgment for it, agreeing to pay 5*l. per cent.* interest. Various changes took place in the house, in the course of which

one of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms, till the last became bankrupt. The clerk continued to serve all the different firms, and was cognizant of the different changes:—*Held*, that he might, notwithstanding, recover the money he had advanced from the two persons who signed the acknowledgment.

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It appeared that the plaintiff was, at the time when the money was lent and the instrument signed, a clerk in the house of Henry Wyatt and Sons, ale brewers in Portpool Lane, in which house the defendants were partners; that between that time and the commencement of the action several changes had taken place in the firm, among which was the retirement of the defendant Henry Early Wyatt. The plaintiff continued to be a clerk in the concern under the different firms, and was cognizant of the changes, and received the interest from the funds of the house. The firm in November, 1831, was Wyatt and Thomson, and at that time the concern became bankrupt.

Comyn, for the defendants, contended, that the plaintiff had absolved them, as he knew of the different changes in the house, and must be taken, under the circumstances, to have shifted the credit from time to time from one firm to another.

LORD LYNTHURST, C. B.—I am of opinion that the instrument is still binding upon both defendants, unless an agreement was made between the parties, by which the plaintiff agreed to discharge the first firm and substitute others. I think that mere knowledge of the changes will not be sufficient; there must be some agreement shewn between the parties.

Verdict for the plaintiff.

Jervis and *Ball*, for the plaintiff.

Comyn, for the defendants.

[Attornies—*Knight*, and *Wright & Co.*]

See the case of *David v. Ellis* and Another, Vol. 1 of these Reports, p. 368.

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*First Sitting at Westminster in Michaelmas
Term, 1832.*

BEFORE MR. BARON VAUGHAN.

AYLING and Another, Assignees of COWLING, an Insolvent, *v.* WILLIAMS.

Nov. 8th.

TROVER for a harp. Plea—General issue.

It appeared that Miss Cowling, the insolvent, had been arrested on the 28th of July, 1831, and that she had filed her petition in the Insolvent Debtors' Court on the 31st of August following. It also appeared from the statement of the defendant, when he was examined in the Insolvent Debtors' Court, that Miss Cowling owed him 35*l.* or 36*l.* for money lent, and that he told her that she ought to secure him; however, it did not appear that he had threatened any legal proceeding. It further appeared that Miss Cowling, having pawned the harp with a pawnbroker named Dry, had, while in the lock-up house, sent the pawnbroker's duplicate to the defendant, who had obtained possession of the harp on paying Mr. Dry a sum of 2*l.* 6*s.* 3*d.*, which was the amount for which the harp had been pawned, and the interest. The plaintiffs' attorney gave evidence as follows—"I went with Mr. Ayling, one of the plaintiffs, to call on the defendant in the month of May, 1832. I produced the assignment by which the plaintiff was appointed one of the assignees of Miss Cowling, and demanded the harp. I said that the assignees were willing to pay his charge upon it. He said he would make out his account. I told him I meant the sum of 20*l.*, and interest, and any expenses he might have incurred in taking the harp out of pawn, he said—'If that is what you mean I shall not deliver it up at all; and unless the whole of my account is paid, I will not give the

A. received from B., an insolvent, the pawnbroker's duplicate of a harp, which was an undue preference under sect. 32 of the Insolvent Act, 7 Geo. 4, c. 57. A. took the harp out of pawn:—*Held*, that, as against the assignees, A. had no lien on the harp for the sum he paid to take it out of pawn.

Semble, that where a party claims to hold goods for his general balance, he cannot object that a smaller sum for which he really has a lien, has not been tendered to him.

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harp up.'” On his cross-examination, the plaintiffs’ attorney said—“No money was produced, and I did not take any with me for the purpose of this tender. I believe Mr. Ayling had the money, though I certainly did not see it.”

Thesiger, for the defendant.—I submit that this is no tender at all.

Mr. Baron VAUGHAN.—This is a very doubtful tender, there was no money produced, and the witness who was the spokesman certainly had it not. If there had been proof that the parties had had the money with them, I think it would have been sufficient, because the defendant clearly dispensed with the production of it.

Erle, for the plaintiffs.—There is a great difference between tendering for a lien and tendering for a debt, because, in the former case, you ascertain whether the party claims to hold in respect of the lien or on any other account. I submit, that the defendant had no lien even for the 20*l.*, because, if a wrongdoer pays money to get goods into his possession, he thereby acquires no lien upon them against the person who is entitled to them. That was decided in the case of *Lempriere v. Pasley* (a), and the defendant here was clearly a wrongdoer, as Miss Cowling’s giving him the duplicate was a preference within the 32nd section of the Insolvent Debtors’ Act, 7 Geo. 4, c. 57 (b).

(a) 2 T. R. 485. In that case it was held, that goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner.

(b) By which it is enacted, “That if any prisoner who shall

file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods,

Mr. Baron VAUGHAN.—It appears to me, that the defendant obtained this harp in direct contravention of the provisions of the Insolvent Debtors' Act, and that, therefore, he is not in the same situation as the pawnbroker, who would certainly have been entitled to be paid before he gave the harp up. If it had turned on the question of tender, I would have given you leave to move, although the inclination of my opinion is, that, as the defendant claimed a lien for his general balance, he could not insist on a tender of the smaller sum.

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Verdict for the plaintiffs—Damages 60%.

Erle and Cooke, for the plaintiffs.

Thesiger and G. T. White, for the defendant.

[Attornies—*Torkington and Williams*.]

or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided al-

ways, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within *three months* before the commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

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Sitting in London after Michaelmas Term, 1832.

BEFORE MR. BARON BOLLAND,
(*Who sat for the Lord Chief Baron.*)

—
CRANBROOK v. DADD.

A bond was executed by a person who could not write:—
Held, that if there was no other plea besides *non est factum*, the defendant's counsel could not ask whether the bond was read over to the defendant before he signed it, nor what was the transaction respecting which it was given.

DEBT on bond. Plea—*Non est factum*.

The bond was signed by the mark of the defendant. The attesting witness was called, and he proved the execution of the bond by the defendant.

Hutchinson, for the defendant, proposed to ask, in cross-examination, as to the nature of the transaction which formed the subject of the bond.

Mr. Baron BOLLAND.—I think you cannot ask that.

Hutchinson then proposed to ask the witness whether the bond was read over to the defendant before he put his mark to it.

Mr. Baron BOLLAND.—You cannot go into that upon this form of pleading.

The question was not put.

Verdict for the plaintiff.

Chilton, for the plaintiff.

Hutchinson, for the defendant.

[Attornies—*Jeyes*, and *Hall & B.*]

In the case of *Edwards v. Brown*, 1 Crompt. & J. 307, it was held, that where a party who executes a bond is at the time competent to execute it, he cannot, under the plea of *non est factum*, shew that he was misled as to the legal effect of the bond. In the judg-

ment of Mr. Baron Bayley in that case, the previous authorities are referred to and discussed.

See the cases of *Ball v. Taylor*, ante, Vol. 1, p. 417; *Loyd v. Freshfield*, ante, Vol. 2, p. 325; *Tod v. Earl of Winchelsea*, id. p. 488.

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*Adjourned Sittings at Westminster, after
Michaelmas Term, 1832.*

BEFORE MR. BARON VAUGHAN,
(Who sat for the Lord Chief Baron.)

VYSE v. CLARKE.

Dec. 1st.

ASSUMPSIT for goods sold and delivered.—There was no plea of the general issue, but a special plea, in which the defendant stated in substance that he did not owe any greater part of the damages laid in the declaration, than the sum of 29*l.* 11*s.* 6*d.*, and that for that sum the plaintiff drew a bill on him, which he accepted. The plaintiff replied that he did not claim more than the 29*l.* 11*s.* 6*d.*, but that no such bill was drawn and accepted as the defendant in his plea alleged. Upon this issue was taken.

It appeared that the plaintiff was a straw-bonnet maker in London, and the defendant was in the same way of business at Kirby Moorside, in Yorkshire—that in January, 1831, the plaintiff's traveller called upon the defendant, when the following statement of the account was made between them:—

“ Mr. Clarke <i>Dr.</i> to Thos. Vyse.						
Goods	-	-	-	-	-	£18 12 0
Do.	-	-	-	-	-	10 19 6
						£29 11 6

1831. January. By bill at two months - £29 11*s.* 6*d.*”

The traveller stated that the account was overdue nearly three journies, and that he went expecting to receive cash. The defendant offered him a bill, but he told

The traveller of a tradesman in London called on his employer's debtor in the country, and being unable to obtain cash, consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill except the name of the drawer, and sent it up to his employer, telling the debtor that he did not think it would be satisfactory. The employer kept the bill, but did not put his name to it as drawer. The traveller had no authority to sign bills, but was in the habit of sending them up without a drawer's name to prevent risk by loss.—*Held* that these facts did not amount to proof of the drawing of a bill so as to prevent the creditor

from recovering for his original demand before the instrument purporting to be a bill became due.

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him that it was unreasonable to expect Mr. Vyse to take a bill, and he did not think he would be satisfied with it; but after several unsuccessful attempts to obtain cash, either for the whole or a part, the traveller consented to take an acceptance from the defendant, and accordingly wrote out the form of a bill of exchange, but did not put any name to it as drawer. The defendant wrote his name on it as acceptor, and it was sent up that same evening to the plaintiff. The traveller said, that he had not any authority to sign bills, but, when on a journey, was in the habit, to prevent risk from loss, of sending them up to the plaintiff, who, if he pleased, put his name to them in London. He added, that he did not suppose the defendant knew that he had not signed the bill, but that he told him, after it was accepted, that he should send it up to the plaintiff, but did not think that he would be satisfied with it.

The bill was kept by the plaintiff, and produced at the trial in the same state as when the traveller sent it up. The defendant was arrested almost immediately after the acceptance had been given, in consequence of intimation received by the traveller that he was likely to run away.

C. Cresswell, for the defendant, contended, that, as the plaintiff's reason for not allowing the traveller to put the name in the country was merely for security, it was not a denial of an authority to draw, and, therefore, the bill was, in point of law, a complete bill as between the parties;—and, 2ndly, that if it were not a complete bill at first, yet that the defendant, by not returning it, had prevented himself from suing for the debt for which it was given.

Follett, for the plaintiff.—It was no bill of exchange, as the drawer's name was not there. The paper was sent up to the plaintiff, and he might or might not make it a bill. It is a paper which will be very good evidence of the debt, but it is clearly not a bill of exchange.

VAUGHAN, B.—The only question upon this issue is, whether the plaintiff drew his bill. It appears to me, that the defendant has failed to make out the issue—the affirmative of which is upon him—I think that the having no authority to *sign* is tantamount to having no authority to *make*. I think if the traveller had no authority to sign the bill, and the plaintiff did not adopt the bill afterwards, it is no bill drawn by the plaintiff. There must be a drawer to a bill—I do not say that a person may not so deal with such an instrument as to make it a bill—but in this case I do not think that the facts warrant the conclusion that any bill was drawn.

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Verdict for the plaintiff, 29*l.* 1*l.* 6*d.*

C. Cresswell applied for leave to move.

VAUGHAN, B., said, that he had not any doubt upon the point; but that the defendant might move, if he would bring the money into Court.

No motion was made.

Follett and Cowling, for the plaintiff.

C. Cresswell, for the defendant.

[Attornies—*Adlington & Co.*, and *Bell & Co.*]

1832.

COURT OF KING'S BENCH.

Adjourned Sittings at Westminster after Michaelmas Term, 1832.

BEFORE LORD CHIEF JUSTICE DENMAN.

Nov. 29th.

STANDAGE and Another v. CREIGHTON.

If the clerk of an attorney has the management of a cause, what he says is receivable in evidence, the same as if it had been said by the attorney himself.

An offer on the part of the indorser of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residue, will not dispense with the proof of notice of dishonour.

ASSUMPSIT by the plaintiffs, as the indorsees, against the defendant, as third indorser of a bill of exchange for 100%.

Evidence was given that notice of the dishonour of the bill had been sent, addressed to the defendant, at two different places, but there was no evidence that he resided or carried on business at either.

Mr. Lumley, the plaintiffs' attorney, was called to prove a conversation that he had had with the managing clerk of the defendant's attorney.

Hutchinson, for the defendant.—I submit that what the managing clerk says is not receivable in evidence.

DENMAN, C. J.—If the clerk had the management of this cause I think that what he says is receivable.

Mr. Lumley said that the managing clerk of the defendant's attorney had offered to pay down 30% and the costs, and to secure the residue by a warrant of attorney.

DENMAN, C. J.—I think that that is not sufficient to dispense with proof of the notice of dishonour. The defendant might, if time had been given him, have been

willing to have waived any objection with respect to the notice of dishonour.

Nonsuit.

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v.
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Steer, for the plaintiffs.

Hutchinson, for the defendant.

[Attornies—*Lumley* and *Fraser*.]

IN the ensuing term a rule *nisi* for setting aside the nonsuit was granted, upon affidavits.

See the case of *Taylor v. Forster*, *ante*, Vol. 2, p. 196, and the cases there cited. See also *Dixon v. Hill*, *post*.

Adjourned Sittings in London after Michaelmas Term, 1832.

BEFORE LORD CHIEF JUSTICE DENMAN.

BOSS v. LITTON.

Dec. 13th.

TRESPASS for injuring the plaintiff, by driving a cart against him. Plea—Not guilty.

It appeared that the plaintiff was walking in the carriage way in the neighbourhood of Islington, about ten o'clock in the evening, when the defendant, who was driving a taxed cart, turned out from behind a post chaise and drove against the plaintiff, and knocked him down. A policeman, who was called as a witness, stated, that he never walked upon the footpath, it was in so bad a state.

A foot-passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it.

Comyn, for the plaintiff, called another witness, and was questioning him as to the state of the footpath, when—

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DENMAN, C. J., observed, I do not think that any more evidence need be given on that subject. The policeman has proved the state of the path. A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not, especially at night, when carriages are passing along (a).

Thesiger, for the defendant, said that he was in a condition to prove that the injury arose from accident.

Comyn, for the plaintiff, replied, that, as it was an action of trespass, with only the general issue pleaded, such evidence could not be received. He cited *Knapp v. Salisbury* (b), in which Lord *Ellenborough* said—"This is an action of trespass; if what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise and kill the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so."

Thesiger referred to a case of *Vanderplank v. Miller* (c) as an authority in his favour.

But it turned out, on reference, that that was an action on the case, and DENMAN, C. J., said—"I take Mr. *Comyn's* law to be quite correct, that the only question is, did the defendant strike the plaintiff by driving his cart against him?"

Thesiger then referred to the case of *Gibbon v. Pepper* (d), in which a special plea was demurred to, and the

(a) See the case of *Pluckwell v. Wilson*, Bart., *ante*, p. 375.

(b) 2 Camp. 500; see also *Milman v. Dohwell*, Id. 378.

(c) 1 M. & M. 169.

(d) 2 Salk. 637. In trespass and assault, &c., the defendant pleaded, that he was riding a horse on the king's highway, and that his horse, being frightened, ran

Court held that it was bad for want of a confession, but said that the defendant might have proved the facts it contained under the general issue.

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DENMAN, C. J.—I do not see that that case is at variance with the case cited for the plaintiff of *Knapp v. Salisbury*, as the facts pleaded went to shew that the horse ran away with the defendant, and therefore it would not be his act which produced the injury (*a*). I think, upon the evidence produced, which it seems impossible to contradict, that there is no defence on the general issue. But I think that you may give in evidence in mitigation of damages any thing that does not amount to a defence.

Thesiger then addressed the jury, and contended, that the plaintiff ought to have avoided the foot-path, so that he might have avoided any carriage passing; and if he had done so, the injury would not have been sustained.

Witnesses were called to shew that the plaintiff previous to the injury, had had a paralytic stroke.

DENMAN, C. J., in summing up, said—That all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of reasonable care on the part of persons driving carriages along it.

Verdict for the plaintiff—Damages 20*l*.

away with him, and that the plaintiff and others were called to go out of the way, and did not, and the horse ran upon the plaintiff against his will, &c.; the plaintiff demurred, and had judgment: not but if the defendant had pleaded not guilty this matter might have acquitted him upon evidence; but

the reason of the judgment was because the defendant justified a trespass, and did not confess it, for if A. beats my horse, by which he runs on another, A. is the trespasser, and the rider is not.

(*a*) See the next case of *Goodman v. Taylor*.

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Comyn and Kelly, for the plaintiff.*Thesiger and Milner*, for the defendant.[Attornies—*C. Woolly*, and *Walker*.]

Dec. 13th.

GOODMAN v. TAYLOR.

In an action of trespass for injury done to a horse by a pony and chaise running against it, it was sworn, on the part of the defendant, that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, who ran off with the chaise:—*Held*, that, if true, this was a good defence on a plea of not guilty.

TRESPASS for an injury to the plaintiff's horse by a pony and chaise belonging to the defendant. Plea—Not guilty.

Two witnesses for the plaintiff swore, that for half an hour before the accident they saw the pony and chaise standing in the street without any person to take care of them, and also that they afterwards saw the pony running away with the chaise, and were present when it ran against the plaintiff's horse, but they did not know the cause of the pony's starting.

On the part of the defendant, witnesses were called who said that the defendant's wife stood by the head of the pony, holding it by the rein, when a Punch and Judy show coming by frightened the pony, and he ran away, and almost pulled the defendant's wife down while she tried to hold him in, and she was at length obliged to let go the rein.

Chambers, for the defendant, contended, that, under these circumstances, the defendant was entitled to the verdict.

Comyn, for the plaintiff, only observed on the contradictory evidence, and submitted that the plaintiff's witnesses were most entitled to credit.

DENMAN, C. J., in summing up, (*inter alia*), said—If

the facts are true as suggested for the defence, I very much think you would be disposed to consider this as an inevitable accident, one which the defendant could not prevent. Indeed the learned counsel for the plaintiff seems to admit that, for he does not contend that the defendant's wife was not a proper person to have the care of the pony, but he puts the case upon the contradiction between the testimony of the witnesses. His lordship read the evidence, and left the case to the jury, who found a—

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Verdict for the plaintiff—Damages 19*l.* 5*s.*

Comyn, for the plaintiff.

Chambers, for the defendant.

[Attornies—*Garry*, and *Person*.]

See the case of *Boss v. Litton*, ante, p. 408, and *Gibbon v. Pepper* cited therein.

HOME WINTER CIRCUIT, 1832.

MAIDSTONE ASSIZES.

BEFORE MR. BARON GURNEY.

1832.

Dec. 12th.

REX v. JOHN PENSON.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:—*Held*, that this was no answer to the charge, although if the first marriage had taken place under such circumstances that would have been thereby rendered void.

THE Prisoner was indicted for Bigamy.

It appeared that the prisoner, in 1828, had married Anne Wootton; and, during her lifetime, in 1832, he married Eliza Brown, by the name of Eliza Thick.

The second wife swore, that she had never gone by, or been known by, the name of *Thick*, and she had assumed it when the banns were published, that her neighbours might not know that she was the person intended.

J. Espinasse, for the prisoner.—I submit that, upon this evidence, the indictment cannot be supported. In order to constitute the offence of bigamy, the second marriage should possess all the requisites for a valid one, except the ability of the party to contract it by having a former wife or husband living. To constitute a valid marriage, it is necessary that the parties should be married in their right names, or by such as they were commonly known by (*a*); and that is not so here, as the second

(*a*) In the case of *Rex v. Inhab. of Tibshelf*, 1 B. & Ad. 190. Lord *Tenterden*, C. J., says that, with respect to marriages, the following rules are fully established by a series of decisions:—"First, that

wife has stated that she had never passed by the name in which she was married. This marriage, therefore, was void *ab initio*, and there being then no second marriage, the offence of bigamy has not been committed.

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GURNEY, B.—That applies only to the first marriage; and I am of opinion, that parties cannot be allowed to evade the punishment for an offence, by contracting a concerted invalid marriage (*b*).

Verdict—Guilty.

if there be a total variation of a name or names, that is if the banns are published in a name or names totally different from those which the parties or one of them ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid; and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not.—But, *secondly*, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names have been such as the parties have used and been known by at one time and not at another; in such cases the publication may or may not be void: the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose or arose from a fraudulent intention. It

is in this class of cases only that it is material to inquire into the motives of the parties.”

(*b*) In the case of *Rex v. Allison*, R. & R. C. C. R. 109. The indictment was against the prisoner for marrying Anna Timson, while he had a wife living. The second marriage was by banns, and it appeared that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. On a case reserved, the Judges held unanimously that the second marriage was sufficient to constitute the offence, and that after having called the woman Anna in the note he gave in, it did not lie in the prisoner's mouth to say that she was not known as well by the name of Anna as by that of Susannah; or that she was not rightly called by the name of Anna in the indictment.

COURT OF KING'S BENCH.

*First Sitting at Westminster in Hilary Term,
1833.*

BEFORE MR. JUSTICE J. PARKE.

1833.

Jan. 12th.

ORR and Others v. BROWNE.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a *concordat*; it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the *concordat*, but they should

shew that the action is brought with the assent of the commissioners named therein.

THIS was an action for money lent—brought in the names of the three plaintiffs, Messrs. Orr, Goldsmid, and Fladgate. Plea—the general issue.

It appeared that the plaintiffs, who had carried on the business of bankers at Paris, had advanced a sum of 34*l.* to a person named Wynch, at the instance of the defendant, and that the plaintiffs had afterwards become bankrupt. It further appeared that, on the 1st of July, 1831, a *concordat* had been signed by the creditors of the plaintiffs (*a*). This *concordat* stated that two of the plaintiffs,

(*a*) On the subject of *concordats*, it is by the *Code de Commerce*, chap. 8, sec. 2, ordained as follows:—

519. Il ne pourra être consenti de traité entre les créanciers délibérans et le débiteur failli qu'après l'accomplissement des formalités ci-dessous prescrites:—

Ce traité ne s'établira que par le concours d'un nombre des créanciers formant la majorité et représentant en outre par leurs titres de créances vérifiées les trois

quarts de la totalité des sommes dues, selon l'état des créances vérifiées et enregistrées, conformément à la section IV, du chapitre VII; le tout à peine de nullité.

520. Les créanciers hypothécaires inscrits, et ceux nantis d'un gage n'auront point de voix dans les délibérations relatives au concordat.

521. Si l'examen des actes, livres et papiers du failli, donne quelque présomption de banqueroute, il ne pourra être fait aucun

Messrs. Orr and Fladgate, had agreed to make certain payments to the creditors, and also to give them the benefit of the result of a litigated claim, which belonged to Mr. Orr, and then stated as follows :—

Article 3.—The creditors accept the engagements and transfers resulting from the aforesaid articles, and by means of which they make a surrender pure and simple, definitive and entire to the hands of Orr, Goldsmid, and Company, of all that may remain due to them in principal, interest, and charges.

Article 4.—This remittance is consented to, with the condition that Messrs. Orr and Fladgate shall be charged collectively or separately, in the case that the one

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traité entre le failli et les créanciers, à peine de nullité: le commissaire veillera à l'exécution de la présente disposition.

522. Le concordat, s'il est consenti, sera, à peine de nullité, signé séance tenante: si la majorité des créanciers presens consent au concordat, mais ne forme pas les trois quarts en somme, la délibération sera remise à huitaine pour tout délai.

523. Les créanciers opposans au concordat seront tenus de faire signifier leurs oppositions aux syndics et au failli dans huitaine POUR TOUT DELAI.

524. Le traité sera homologué dans la huitaine du jugement sur les oppositions. L'homologation le rendra obligatoire pour tous les créanciers, et conservera l'hypothèque à chacun d'eux sur les immeubles du failli: à cet effet, les syndics seront tenus de faire inscrire aux hypothèques le jugement d'homologation, à moins qu'il n'y ait été dérogé par le concordat.

525. L'homologation étant signifiée aux syndics provisoires ceux-ci rendront leur compte définitif au failli en présence du commissaire, ce compte sera débattu et arrêté. En cas de contestation le tribunal de commerce prononcera: les syndics remettront ensuite au failli l'universalité de ses biens, ses livres, papiers effets. Le failli donnera décharge les fonctions du commissaire et des syndics cesseront, et il sera dressé du tout procès-verbal par le commissaire.

526. Le tribunal de commerce pourra pour cause d'inconduite ou de fraude refuser homologation du concordat, et dans ce cas le failli sera en prévention de banqueroute et renvoyé de droit devant le magistrat de sureté qui sera tenu de poursuivre d'office. S'il accorde l'homologation le tribunal déclarera le failli excusable et susceptible d'être réhabilité aux conditions exprimées au titre ci-après DE LA REHABILITATION.

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of them shall refuse to concur in it, to follow the liquidations of the firm of Orr, Goldsmid, and Company, with the concurrence and under the inspection of two commissioners hereinafter mentioned. Messrs. Wright Truffait, and Sloper, are named commissioners, in order to concur in the liquidation in question.

Article 5. In default of the house of Orr, Goldsmid, and Company, executing faithfully the present *concordat* in its different parts, it shall be deprived of the benefit that results therefrom; and, after a declaration of their default, the creditors shall re-enter into their full rights, and that which they shall have been paid shall be considered as simply on account.

Article 7.—Under the faith of the execution of the present *concordat*, in its several parts, the creditors re-instate the members of the firm of Orr, Goldsmid, and Company, in the administration of their goods, in whatever country that administration may be exercised. They make null, in every necessary case, all acts, which be opposed to the said administration.

This *concordat* had been confirmed by the *Cour de Commerce* of the department of the Seine in France.

There was no dispute respecting the advance of the money, and a copy of the confirmation of the *concordat* was read in evidence by consent.

It was proved by M. Colin, an advocate at the French bar, that two parties may contract for a third, if it be for his benefit (a).

Kelly, for the defendant.—I submit that the plaintiffs cannot maintain this action without proving the assent of the commissioners named in the *concordat*.

(a) *Code Civile*, art. 1121, "On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une

donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter."

To shew this, the following letter, written by the commissioners to the plaintiff's attorney, was given in evidence:—

“ 11 Rue Lafitte, Paris, 23 Nov. 1832.

“ In the matter of Orr and Co. *versus* Browne.

“ Sir,—We enclose you the original office-copy of the judgment, ratifying and confirming the *concordat* of Messrs. Orr, Goldsmid, and Co. We do not know what degree of importance may be attached to our assurance, should Mr. Browne persist in his defence and go into court; but we think it proper to send you with this document our assurance as to its correctness and authenticity. We trust you will continue to give the affair your best attention, and that the measures which you have taken will soon succeed in realizing the just claim of the three against Mr. Browne. We are, Sir, yours obed.,

“ George Wright H. Truffait,
“ Robert Sloper.”

“ It may be added that the commissioners would not sanction any settlement that Browne could make with Orr, unless Mr. Fladgate consented thereto.”

Kelly.—I submit that the plaintiffs should shew, that they have performed their part of the agreement contained in the *concordat*.

Mr. Justice J. PARKE.—By the *concordat*, the plaintiffs are reinstated, and they can only be ousted after a declaration of their default. The plaintiffs have made out their case.

Verdict for the plaintiffs.

Sir *J. Scarlett* and *Curwood*, for the plaintiffs.

Kelly, for the defendant.

[Attornies—*W. Fladgate*, and *Browne*.]

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Jan. 14th.

The carriage of *A.* being on the premises of *B.*, was seized by *C.* for rent due by *B.* to his landlord, *D.* In an action of trover brought by *A.* against *C.*, a witness proved that *B.* had held the premises of *D.* for more than a year, but that he had a lease of them:—*Held*, that the lease must be produced and given in evidence, and that *B.*'s acquiescence in the distress would not dispense with such proof.

SHEPHERD *v.* CAFE.

CASE.—The first count of the declaration stated, that the plaintiff had sent a chaise to a person named Portlock, to be repaired; and that, while it was so in the possession of Portlock, the defendant had seized and sold it. There was also a count in trover. Plea—General issue.

It appeared that the plaintiff had originally sent the chaise to Mr. Portlock, who was a coachmaker, for the purpose of having it repaired; but that, after the repairs were completed, the plaintiff took it away, and subsequently sent it back to Mr. Portlock's, "on standing" for the purpose of its being sold, if a sum of 40 or 45 guineas could be obtained for it. While it remained so "on standing," it was seized and sold by the defendant. It was proved to be usual for coachmakers to have carriages on standing, for the purpose of sale; and that they charged a certain sum per week while a carriage so remained, and also a per centage on the price when the carriage was sold.

The defence was, that Mr. Portlock owed rent to his landlord, Mr. Peake, and that the defendant seized the chaise under a distress for rent.

A witness stated, that Mr. Portlock was the tenant of Mr. Peake, and had occupied the premises for more than a year; but that he held the premises under a lease.

Mr. Justice J. PARKE.—The lease must be put in.

F. Pollock, for the defendant.—I submit, that if I prove that Mr. Portlock acquiesced in the distress, that will be sufficient, without proof of the lease.

Mr. Justice J. PARKE.—I think that, as there is a lease, you must put it in and prove it in the regular way. The plaintiff is entitled to a verdict.

Verdict for the plaintiff—Damages 38*l.*

Thesiger, for the plaintiff.

F. Pollock and Comyn, for the defendant.

[Attornies—*Woodhouse*, and *J. Hamilton*.]

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FOREMAN and Another, Executor and Executrix of PHILADELPHUS JEYES v. FREDERICUS JEYES.

Jan. 14th.

DEBT on bond, with counts upon two promissory notes. Pleas to the first count—*Non est factum, solvit ad diem*, and *solvit post diem*. Pleas to the other counts—*Nil debet*, and to the whole declaration, a set-off.

A bond conditioned to pay 1,000*l.* on a day five years from the date, and to pay interest, half yearly, in the mean time, only requires a stamp for the amount of the principal sum of 1,000*l.*

The bond was put in. It was dated August 2, 1818, and was in the penal sum of 2,000*l.*, and upon the following condition:—"The condition of the above-written obligation is such, that, if the above bounden Fredericus Jeyes, his heirs, executors, or administrators, do and shall well and truly pay to the said Philadelphus Jeyes, his executors, administrators, or assigns, the full sum of 1,000*l.* of good and lawful money of Great Britain, and interest, on the 2d day of August, which will be in the year of our Lord, 1823; and also do and shall well and truly pay or cause to be paid, half yearly, the interest to accrue due on the said 1,000*l.*, after the rate of five pounds by the hundred by the year, that is to say, on the 2d day of February and the 2d day of August, in each and every year, or within fourteen days then next following; the first payment thereof to be made on the 2d of February next, or within fourteen days then next following, then the above written obligation to be void."

The bond was on a 5*l.* stamp.

Miller, for the defendant.—I submit that this bond is not properly stamped. It is a bond to pay 1,000*l.* on a certain day, and to pay certain sums more as interest, on

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other certain days. This stamp is only sufficient for a bond of 1,000*l.*, and not so for a bond for 1,250*l.*, which this bond really is. By the stamp act, 55 Geo. 4, c. 184, "a bond given as a security for the payment of any definite and certain sum of money," is where the sum exceeds 500*l.* and does not exceed 1,000*l.*, to bear a stamp of 5*l.*; but where the sum exceeds 1,000*l.* and does not exceed 2,000*l.*, the stamp ought to be six pounds; and in the same statute, bonds "given as a security for the payment of any annuity, or of any sum or sums of money at stated periods (*not being interest for any principal sum, nor rent reserved or payable upon any lease or tack,*)" are made liable to a different duty.

Mr. Justice J. PARKE.—This latter enactment may either mean that interest is not to be reckoned in calculating the stamp duty, or that it is to be charged at a different rate. I know it has been decided, that a bill given for a certain sum and interest, only requires a stamp for the amount of the principal.

Miller.—This is not the case of an ordinary bond to pay a certain sum on or before a particular day, when, by paying the principal at once, the party would not be liable to interest; but here the principal is to be paid on the 2nd of *August*, 1823, and the other sums must also be paid for interest at all events; therefore, nothing can be more definite and certain than the amount to be paid. In the case of *Attree v. Anscomb* and Others (*a*), it was held that a bond conditioned for the payment, by quarterly payments, of an annual rent of 865*l.* for the tolls of Brighton Market was a bond within that branch of the stamp act which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money.

(*a*) 2 M. & S. 88. That case was decided on the stamp act, 48 Geo. 3, c. 149; but the two statutes are worded exactly alike, so far as regards this point.

Campbell, S. G., for the plaintiff.—The amount of the tax is meant to be the sum lent, and not the interest to be paid upon it.

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Mr. Justice J. PARKE.—I think the stamp is sufficient, and therefore the bond may be read (a).

The bond was read.

The cause was referred.

Campbell, S. G., and *Kelly*, for the plaintiffs.

Miller, for the defendant.

[Attornies—*H. Watson* and *F. Jeyes*.]

(a) In the case of *Dearden v. Binns*, 1 M. & R. 130, a bond had been given for the payment of 200*l.*, with lawful interest, by the payment of instalments of 2*l.* 8*s.* per month, “until the sum of 200*l.*, and interest upon the whole sum throughout the time afore-

said shall be fully paid and satisfied.” This bond bore a 2*l.* stamp, which was the proper stamp on 200*l.*, and it was held to be sufficient. See also *Dixon v. Robinson*, *ante*, p. 96, and the cases there cited.

Sitting in London after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE DENMAN.

LUXFORD v. LARGE.

Feb. 3rd.

THE declaration stated, that the plaintiff, before and at the time &c., was *lawfully possessed* of a certain boat or

In an action against the captain of a steam vessel for swamping a

loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell *alone*: and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant.

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vessel of great value, then lawfully being in the river Thames, &c., and the defendant was then the captain and commander of a certain steam boat or vessel, then also being in the river Thames, &c., and then and there had the care, management, and government of the same; yet the defendant, not regarding his duty, &c., whilst the said boat or vessel *of the said plaintiff* was so in the river Thames, &c., so carelessly, negligently, and improperly behaved and conducted himself, in and about the management and government of the said steam boat or vessel, and so carelessly, negligently, and improperly managed and governed the same, that by means and in consequence of the carelessness, negligence, and improper conduct of the defendant in that behalf, the said steam boat then and there wrongfully, negligently, and improperly was propelled, and did sail and go in the said river Thames so rapidly, quickly, and improperly, that by means and in consequence thereof, the said steam boat or vessel then and there caused and occasioned the waters of a certain part of the said river Thames to become, and the same thereby then and there did become, and were, so agitated, rough, uneven, and dangerous, that thereby the said boat or vessel *of the said plaintiff*, then being in the said part of the said river Thames where the waters thereof were so agitated and dangerous, as aforesaid, then and there became, and was filled with water, swamped, and sunk, &c.; and by means of the premises, the plaintiff being in *his said boat* when the same was filled with water as aforesaid, was greatly wetted, and in great danger of being drowned, and, in being saved and escaping from drowning, became, and was, greatly bruised, wounded, and injured; and also, by means of the premises, divers goods, &c., to wit, ten quarters of oats, of great value, &c., being in the said boat or vessel of the said plaintiff, when the same was sunk as aforesaid, then and there became and were greatly damaged and spoiled; and also, by means of the premises, *not only* the said boat or vessel of the said plaintiff be-

came and was greatly damaged and injured, and the said plaintiff was put to a great expense, &c. in and about repairing of the damage done to the same; *but, also*, by means of the premises, he the said plaintiff lost and was deprived of all the profits and advantages which might and would have arisen and *accrued to him* from the use of *his said boat* or vessel, if the same had not been sunk and injured as aforesaid, &c. Plea—the general issue.

According to the evidence on the part of the plaintiff, it appeared, that on the evening of Friday, the 28th of October, 1831, the plaintiff was going in a boat with ten quarters of oats in it *down* the river towards Greenwich; that the tide being against him, he kept close to the south shore; that about six o'clock, when he was at Rotherhithe, two steam boats, one called the Essex and the other the Yorkshireman, came by him *up* the river, at intervals of about five minutes; that both, on being hailed, eased their steam, and passed without any injury to the plaintiff's boat; that a few minutes after, the Albion, commanded by the defendant, came along, about the middle of the river, at the rate of eleven or twelve miles an hour; that she was hailed, but did not stop, and that, by means of the swell occasioned by her rapid progress, the plaintiff's boat was swamped and sunk, the plaintiff himself immersed in the water up to his shoulders, and the sacks of oats set floating about the river; that the plaintiff was picked up, and the boat raised, and more than half the corn taken down by him to Greenwich in it the same evening; that the remainder was taken down in another boat the next morning; and that the plaintiff was confined to his house for about a week. No evidence was given on the subject of damage to the boat, and the witness called to prove the damage to the oats failed in making it out. The plaintiff's witnesses said that the boat was eight or nine inches out of the water at midships, and about a foot out at the bows. They added, that the plaintiff turned her head to

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the swell, but she had not power to lift herself over it; and the water, in consequence, came right over her bows.

On the part of the defendant, it was proved, that, on the following day, a letter was written by some one in the name and by the authority of the plaintiff to the secretary of the Steam Company—it was as follows:—

“ Greenwich, October 29th, 1831.

“ To J. Miller, Esq.

“ Sir,—Coming down the Pool last evening with ten quarters of oats in my charge belonging to Messrs. Couldrys, butchers of Greenwich, I was met by the Albion steam packet going up the Pool, the swell from which sunk my boat, containing the above-mentioned corn. In consequence I was subjected to 10*s.* *expenses* for the assistance of watermen to get up the same, and bring it down to Greenwich; and I have likewise been subjected to a liability of making good the damage done to the corn, which the proprietor states to be 4*s.* *per quarter* worse by the accident. By giving me a remuneration *equivalent to the above expenses*, I shall feel myself satisfied, otherwise I shall be under the necessity of seeking redress in another quarter. I am, Sir, yours, &c.

“ Robert Luxford,
 Waterman.”

In consequence of this the secretary communicated with the captain, the defendant, and requested the plaintiff to attend and explain the transaction, which he did in the course of two or three days; and, in course of conversation on the subject, he said that he knew the Albion by her length, and saw her *about passing him when his boat was swamped*. Shortly after the interview, at which *nothing was said about any personal injury*, the following letter was received by the defendant from the plaintiff's attorney:—

“ Furnival's Inn, 2nd November, 1831.

“ Sir,—I am directed by Robert Luxford to apply to

you for a compensation for the *very serious injury* he has sustained by being swamped by the Albion Steam Boat on Friday last; I will, therefore, thank you to inform me of the name of your attorney, to whom I may send process. I am, Sir, your obedient servant,

Thomas Flower."

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It was also proved by several of the crew of the Albion, that at Greenwich she was put on half speed, and went only at the rate of about four miles and a half an hour, in addition to the tide, which was running about two miles and three quarters or three miles an hour; that the Yorkshireman was about a quarter of a mile a-head of the Albion at the time in question; and that it would be about that distance off when its swell would reach the shore. It was further proved, that the plaintiff had only borrowed the boat for the occasion, and returned it uninjured the same evening; and the person for whom it was built proved that he had once loaded it with potatoes, which weighed four hundred weight less than the ten quarters of oats, and it had not then more than three or four inches free board, and he considered it was not safe to carry even that weight, except in very fine weather. The person to whom the oats were delivered said, that he had not made any charge against the plaintiff in respect of the oats, nor had he said anything about their being 4s. a quarter worse; but, on the contrary, on the plaintiff's complaining of the accident the next morning, he paid him and the men who assisted him for their additional trouble (a).

(a) It also appeared that the plaintiff, on being remonstrated with for going to law under such circumstances, said, that his attorney had undertaken to bring the action for him on the terms of "no purchase no pay." Upon this the Lord Chief Justice, with

reference to the observations of counsel on both sides, said, that perhaps it might be difficult for a poor person to bring a cause into Court without some such assistance; but he could not say, that, upon the whole, it was a practice to be approved of.

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Platt, for the defendant, contended—*First*, that, if, as the plaintiff said, the Albion was about passing him at the time his boat was swamped, it could not have been the swell of the Albion that occasioned the swamping, as it would not reach the shore till some considerable time after—and *Secondly*, that, supposing it was, yet the plaintiff, by his improper conduct in overloading his boat, must have brought the injury upon himself, and could not complain of the defendant.

DENMAN, C. J., in summing up, (*inter alia*), said—It seems to me in this case that the plaintiff's claim must be confined to the personal injury he has sustained, as the boat was not his, and the corn was not his. And the question for you will be, whether he is entitled to look to this defendant for compensation. The defendant says—*First*, that the swell was not occasioned by the Albion—*secondly*, that the plaintiff's boat was improperly loaded; and, according to your opinion upon these points, you will find your verdict for the plaintiff or the defendant. If you think that the swell was not occasioned by the defendant's negligent management of the Albion, or that it was the plaintiff's own negligence in loading his boat as he did, which occasioned the injury, then you cannot find any verdict against the defendant. [His Lordship read the evidence, and commented upon it, and concluded by saying]—You must be satisfied that the Albion was going at too great speed, and thereby occasioned the swell; and you will have to say whether it was that swell *alone* which occasioned the injury, or whether *it is doubtful* that such was the case, for that will be enough to prevent the plaintiff's recovering. If you are satisfied that the defendant's vessel occasioned the injury by its improper speed, and that the plaintiff was not in fault, and *did not contribute to his misfortune* by his improper management of his boat, then you will find for the plaintiff, and give him such damages as you consider him entitled to.

The jury consulted for some time and afterwards retired, and eventually found a—

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Verdict for the plaintiff—Damages 5*l*.

Law, C. S., and Ryland, for the plaintiff.

Platt and Payne, for the defendant.

[Attornies—*Flower*, and *J. R. Thomson*.]

See the case of *Vennall v. Garner*, 1 Crompt. & Meeson, 21, which decides, that, “in case for running down a ship neither can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided he was in no de-

gree in fault in not endeavouring to prevent it.” See also the cases of *Wakeman v. Robinson*, 8 J. B. Moore, 63; *Chaplin v. Hawes*, Vol. 3 of these Reports, p. 554; *Lack v. Seward*, Vol. 4, p. 106; and *Pluckwell v. Wilson*, Bart., ante, p. 375.

BENNING v. DOVE.

Feb. 2nd.

THE first count of the declaration stated, that, on the 10th of December, 1827, it was agreed between the plaintiff and defendant in manner following, (that is to say), “The said defendant then and there agreed to sell to the said plaintiff, and the said plaintiff then and there agreed to buy of the said defendant divers, to wit, three hundred

A. having printed a work, sold 300 copies to *B.*, a bookseller, at 40*s.* a copy, binding himself not to sell to others, in quires, under 48*s.*, and in single copies under 50*s.* a copy, un-

til *B.*'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to *B.* “I do not expect you to sell under 48*s.* and 50*s.*, but do as you like.”—When *B.* had sold a part of the 300 copies, he went into partnership with *C.*, and transferred all his stock at the cost price. He also sold some copies at 45*s.* and 46*s.*—*A.*, in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by *B.*, persuaded *D.*, who had purchased the principal part, to consent to give them back, if it would satisfy *B.*—*D.* had an interview with *B.*, and told him this. *D.* said, that he understood the arrangement was a settlement of the difference, and that *B.* went away from the interview perfectly satisfied:—*Held*, in an action by *B.* against *A.* for a breach of the agreement, that neither the underselling by *B.* nor the transfer of the stock to the partnership, were grounds of nonsuit; but that the arrangement with *D.* was an answer to the action, if the jury thought it made an end of the dispute between the parties. *Held*, also, that, on the question of damage, it might be considered whether *B.*'s own underselling had or had not contributed to affect the price of the work in the market.

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copies of a certain literary work, called Commentaries on the Laws of England, by the late Sir William Blackstone, a new edition, with practical notes, by Joseph Chitty, Esq., Barrister at Law, at and for a certain price or sum of money, to wit, the sum of 40s. per copy, amounting in the whole to a large sum of money, to wit, the sum of 600l., to be paid to the said defendant by the said plaintiff on the Monday following, the 1st day of December aforesaid, in the promissory notes of the said plaintiff, at three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months date, in equal sums, *the said defendant not to sell to others numbers of the said work in quires, under 48s. per copy, and single copies not less than 50s., and not to bring out a new edition of the said work till the three hundred copies of the said plaintiff were gone, or till he the said defendant got the consent of the said plaintiff.*" It then averred mutual promises on the part of the plaintiff and defendant to perform their respective parts of the agreement; and that the plaintiff bought the books and paid for them, and then continued:—"Yet the said defendant contriving, and wrongfully and unjustly intending, to injure the said plaintiff, did not nor would perform the said agreement nor his said promises and undertaking, but thereby craftily and subtilly deceived the said plaintiff in this, to wit, that the said defendant afterwards, to wit, on the same day and year aforesaid, and on divers other days and times between that day and the commencement of this suit, and before the said three hundred copies of the said plaintiff were gone, wrongfully, and without the consent of the said plaintiff, *did sell to others numbers of the said work in quires under 48s. per copy, and single copies less than 50s.; whereby the said three hundred copies, of the said plaintiff, of the said work, became and were much lessened in value and price, and the sale thereof greatly injured and decreased; and the said plaintiff hath now on hand a large number, to wit, one hundred and fifty of the said copies unsold and undis-*

posed of, and hath thereby lost and been deprived of great gains and profits, amounting in the whole to a large sum, to wit, the sum of 200*l.*, which he would and might otherwise have derived from the sale and disposition of the said last-mentioned copies, to wit," &c. The second count stated the agreement more briefly; and there was a count on an account stated. The plea was *non assumpsit*.

It appeared that the defendant had printed an edition of Blackstone's Commentaries, by Mr. Chitty, the barrister, and, on the 1st of December, proposed to the plaintiff, who was then carrying on business as a law-bookseller, to sell him three hundred copies, at 42*s.* a copy. The plaintiff objected to pay more than 40*s.*, and to that price the defendant agreed. The material parts of the plaintiff's letter were—"I will only sell to others at 48*s.* inquires, and single copies at 50*s.*, until your three hundred copies are sold, or till I have your consent."—"I do not expect you to sell under 48*s.* and 50*s.*; but do as you like."

On the 10th of December, 1829, there was what is called a trade sale by auction, at the Albion, at which thirteen copies, as twelve, were purchased by Simpkin & Marshall, from the defendant's stock, at 40*s.* a copy; and at a similar sale in March, 1830, at which the defendant presided, twelve copies were purchased by Messrs. Whittaker, and one by Mr. Doyle, at 42*s.* a copy. In the month of February, 1829, the plaintiff entered into partnership with a Mr. Saunders, and the quantity on hand, viz., two hundred and four copies, was removed to the premises of the new firm. On the 1st of January, 1831, another sale took place, at which Mr. Henry Butterworth, a law-bookseller, purchased, in the first instance, twenty-six copies at 40*s.*, and after as many as could be were sold to others, Mr. B. took the remainder, being fifty-one copies, at the same price. In the month of March, 1831, in consequence of an application made to him by the defendant, Mr. But-

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terworth had an interview with the plaintiff, who, at that time, had threatened to proceed against the defendant. Mr. B., in his evidence as to that interview, said—"I stated, that I had made arrangements to return all I had purchased at that sale, in consequence of the agreement between the plaintiff and defendant. (I had sold eight copies in the mean time, at the regular subscription price). I did this to prevent litigation between the parties, at a sacrifice to myself. *The plaintiff told me, that the whole of his stock was taken at cost price as between him and Saunders.* I understood the arrangement made by me between the plaintiff and defendant was *a settlement of the difference.* I should not have returned the books at my own loss, had it not been for the settlement between two parties, whom I respected. *The plaintiff went away perfectly satisfied.*" It appeared further, that the plaintiff's sale of the work, from February to Christmas, 1829, was forty-one copies;—in the year 1830, fifteen copies;—in 1831, eighteen copies; and in 1832, twenty-four copies;—*some* of them were *sold at 45s. and 46s.*; but others at two guineas and a half to the trade, and three guineas and a half to gentlemen. The quantity remaining on hand at Christmas, 1832, was one hundred and six copies.

Sir *J. Scarlett*, for the defendant, contended, 1st, that the plaintiff was bound by implication not to sell the work himself under the price at which the defendant was to sell, and that his selling at 45s. and 46s. was an answer to the action, as being against the good faith and honour of the contract, inasmuch as it would tend to prevent the defendant from selling his copies at all; 2ndly, that the contract was put an end to by the plaintiff's going into partnership in the month of February, 1829, with Mr. Saunders, and transferring his interest to the firm at 40s. a copy, because the undertaking of the defendant was only to continue in force till the three hundred copies were sold by the plaintiff, and his parting with them to a firm of which he was only

a partner, was, in fact, a selling, just as much as it would be in the case of a joint-stock company; and, 3rdly, that the arrangement come to with Mr. Henry Butterworth was in the nature of an accord and satisfaction to the plaintiff. Mr. Butterworth told the plaintiff that he would give back his copies, which formed so large a portion that the rest must be comparatively unimportant, if it would satisfy him, and make an end of the dispute between the parties; to which the plaintiff replied, that it would be very satisfactory, and that, according to his, Mr. Butterworth's, understanding, it was to put an end to all differences, and the plaintiff went away perfectly satisfied. On these grounds the learned counsel submitted that the plaintiff should be called.

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DENMAN, C. J.—I think I cannot nonsuit upon the first ground, as the facts relied on do not appear to have been communicated to the defendant; and, with respect to the second, enough does not appear of the terms on which the partnership commenced, to justify me in deciding that there was a parting with the books by the plaintiff within the meaning of the agreement: with respect to the third ground, it does seem an answer to the action.

On the part of the defendant it was proposed that a juror should be withdrawn. This was objected to on the part of the plaintiff, and the case went to the jury.

DENMAN, C. J., in summing up, after stating the pleadings and reading the letters, observed—It seems that the defendant left the plaintiff at liberty to sell as he pleased, but bound himself down not to sell under the prices stated, and this is an answer to some part of the argument urged in favour of the defendant. You will have to say, first, whether the agreement was made; of this, there does not seem any doubt; and then, whether it was broken; and if it was, you must spell out the damage as well as you can from the evidence. It is a very difficult thing to ascertain

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the amount of damage. I think, in considering that subject, you may reasonably consider, as damage must arise from the effect produced upon the price of the work in the market, by the defendant's having sold copies at a sum lower than the stipulated price, whether the plaintiff's own selling at 45s. and 46s. might not have contributed to that depreciation. If you are satisfied that the agreement was broken, then you will have to say to what extent the plaintiff has been injured; unless you should be of opinion that what took place between Mr. Butterworth and the plaintiff was a complete conciliation up to that time, and was not confined to Mr. Butterworth's individual transaction only. There is no distinct evidence that the plaintiff knew that the defendant had sold to others; but Mr. Butterworth says, that he understood it to be a complete settlement of the difference which existed between the parties, and that he would not have returned the books at a loss to himself if he had not wished to make an end of the disputes between them.

His Lordship left it to the jury to say, in the first instance, whether they thought Mr. Butterworth made an end to the dispute between the parties altogether, telling them, that, if they did, they should find their verdict for the defendant; but, that, if they did not, he would read over to them the evidence upon the subject of the damage (a).

The jury said, they thought that the arrangement made by Mr. Butterworth satisfied the whole of the difference, as he said that the plaintiff went away perfectly satisfied.

Verdict for the defendant.

Grainger, for the plaintiff.

Sir J. Scarlett and *Kelly*, for the defendant.

[Attornies—*Owen & Dixon*, and *Molloy*.]

(a) It was at first thought that damages must be given for the sale of three copies after the settlement of the difference, but it turned out that they were sold after the action was commenced.

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MILLER v. HAMILTON.

ASSUMPSIT for goods sold and delivered.

The plaintiff was a baker, and sought to recover from the defendant a sum of 6*l.* 15*s.* for bread delivered at his house from February 8th to March 22nd, and from April 3rd to May 24th, 1830. It appeared that weekly bills were made out and delivered every week to the defendant's housekeeper, and that the two weeks from the 22nd of March to the 3rd of April had been paid, as had also the whole of the bills from the 24th of May to the latter end of August, at which time the housekeeper left the defendant's service. A few days after she left, payment of the omitted weeks was, for the first time, demanded of the defendant by the plaintiff. It was sworn, on the part of the plaintiff, that the paid bills were all separately receipted, though sometimes three or four weeks were paid at one time.

Campbell, S. G., for the defendant.—The action cannot be maintained. The plaintiff has trusted the housekeeper, and to her he must look. It was a weekly dealing; and as soon as the plaintiff found that some of the bills were not paid, he should have made application to the defendant, and complained of the non-payment, but, instead of doing this, he continued to give receipts weekly from time to time afterwards. If the plaintiff had gone after the housekeeper's omission to pay the weekly bills and told the plaintiff of it, this would not have happened; and his not doing so, but continuing to give receipts afterwards, is tantamount to an admission of his having trusted her.

It was proved, on the part of the defendant, that the plaintiff had said to his wife, after the housekeeper left—“The old woman has done us at last;”—and also, that he told the person who succeeded as housekeeper, that he

A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him:—*Held*, in an action by him to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised, and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question.

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did not think he could recover, as he had acted wrong in receipting the bills and leaving the back debt.

Goulburn, Serjt., for the plaintiff, in reply, (*inter alia*), said—There is no proof that the defendant gave any money to the housekeeper for the purpose of paying these bills, and, without such proof, there is no defence to the action.

DENMAN, C. J., in summing up, said—The plaintiff claims of the defendant the amount of a baker's bill. The defendant says that he has paid it. Now it seems to me, that the last observation made by the plaintiff's counsel decides the case; for it does not appear that the defendant ever gave any money to his housekeeper to make these payments with. The plaintiff thought that she had received the money when he said "the old woman has done us;" and perhaps we may think so too; but, as it is not proved, we cannot act upon it. It seems to me, therefore, that we need not go into the question of negligence, for there has been some negligence on both sides. Under these circumstances, it appears to me, that the verdict should be for the plaintiff.

Verdict for the plaintiff—Damages 6*l.* 15*s.*

Goulburn, Serjt., and *R. Gurney*, for the plaintiff.

Campbell, S. G., for the defendant.

[Attornies—*Ashley*, and *Teesdale & Co.*]

PROMOTIONS.

IN the Vacation after *Easter* Term, *J. T. Coleridge*, Esq., Barrister at Law, was called to the degree of Serjeant at Law.

In the same Vacation, *John Gurney*, Esq., one of his Majesty's counsel learned in the law, was appointed one of the Barons of the *Exchequer*, *vice* Sir *W. Garrow*, Knight, resigned.

In *Trinity* Term, Mr. Serjeant *Taddy* was appointed her Majesty's Attorney-General, *vice* *J. Williams*, Esq.: and Mr. Serjeant *Merewether* was appointed her Majesty's Solicitor-General, *vice* *C. C. Pepys*, Esq.

In the Vacation after *Trinity* Term, Mr. Serjeant *Spankie* was appointed one of his Majesty's Serjeants learned in the law.

In the same Vacation, Mr. Serjeant *Merewether* received a patent of precedence; and *J. Beames*, Esq., *H. H. Joy*, Esq., *C. T. Swanston*, Esq., and *R. M. Rolfe*, Esq., were appointed his Majesty's counsel learned in the law.

In *Michaelmas* Term, Sir *Thomas Denman*, Knight, was appointed Lord Chief Justice of England, *vice* Lord *Tenterden*, deceased; and Sir *William Horne*, Knight, was appointed his Majesty's Attorney-General, and *John Campbell*, Esq., his Majesty's Solicitor-General.

In *Hilary* Term, *Thomas Noon Talfourd*, Esq., was called to the degree of Serjeant at Law.

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COURT OF COMMON PLEAS.

*First Sitting at Nisi Prius in Michaelmas Term,
1832.*

BEFORE MR. JUSTICE PARK.

Nov. 14th.

HILL and Another v. ELLIOTT.

A debtor, being in prison, wrote to the town agents of his creditors' attorneys, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claim:—*Held*, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter, was receivable in evidence, even though the subject-matter of the communication was an offer of 10s. in the pound.

ASSUMPSIT for goods sold and delivered.

Instead of proving the delivery of the goods, *R. Alexander*, for the plaintiffs, put in a letter, written by the defendant when in prison to the town agents of the plaintiffs' solicitor, requesting that they would send to him "a confidential clerk," with whom he might communicate on the subject of the plaintiffs' claim. He then called the person who went to the defendant in consequence of that letter, and proposed to ask him what the defendant said.

Payne, for the defendant, objected to the evidence, on the ground that it would be a breach of faith. He submitted, that the words of the letter intimated the defendant's desire that the interview should be confidential: and, therefore, the party receiving it should have repudiated that part of it, if they intended to make use of the statements in evidence (a); and if they had done so, most likely the defendant would not have been so communicative as he was.

(a) See the case of *Cory v. Bretton*, Vol. 4 of these Reports, 462. There, a letter sent by the defendant to the plaintiffs respecting the money claimed, contained, in the introductory part, these words: "which is not to be used in prejudice of my rights now, or

in any future arrangement that may be made or instituted." And *Tindal*, C. J., refused to receive it in evidence, saying, that if the plaintiffs did not like the letter with such a stipulation in it, they might have sent it back.

Mr. Justice PARK was of opinion that the objection was not sufficient to prevent the evidence from being given.

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The evidence was admitted; from which it appeared, that, with a view to a composition of 10s. in the pound, the defendant admitted that the debt was 81*l*.

Upon this the objection was renewed, on the ground, that the statement was made with a view to a compromise.

But it was overruled by the learned Judge, and there was a—

Verdict for the plaintiffs.

R. Alexander, for the plaintiffs.

Payne, for the defendant.

[Attornies—*Johnson & W.*, and *Sylvester & W.*]

DIXON and Another v. ELLIOTT.

ASSUMPSIT against the same defendant as in the foregoing case, as indorser of two bills of exchange. To dispense with proof of notice of dishonour, it was proved, on the part of the plaintiffs, that the bills were produced to the defendant about two months after they were due, and inquiries of him made as to the drawer and acceptor; upon which he said, that if the plaintiffs would take 10s. in the pound upon the bills he would secure it to them.

On the part of the defendant it was submitted, that this was not sufficient to dispense with the usual proof, as it was not inconsistent with *a doubt* upon the question of notice, that an offer should be made to pay a limited sum.

But Mr. Justice PARK said, that he thought it was sufficient. And there being no defence, there was a—

Verdict for the plaintiffs.

It was proved, in an action against the indorser of a bill of exchange, that, two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said, that if the holder would take 10s. in the pound, he would secure it:—*Held*, sufficient to dispense with proof of notice of dishonour.

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R. Alexander, for the plaintiffs.*Payne*, for the defendant.[Attornies—*Johnson & W.*, and *Sylvester & W.*]

(a) In Phillipps on Evidence, Vol. 2, p. 24, it is said—"The proof of the presentment and of the notice of dishonour will be dispensed with, if the defendant, knowing of the default, has paid any part of the money, or promised to pay, after the note became due; for this is an admission on his part that the plaintiff had a right to resort to him upon the note, and that he himself had re-

ceived no damage from the want of notice. But if the drawer or indorser, after being arrested, merely offers, by way of compromise, without acknowledging his liability, to give a bill for the sum demanded, this will not dispense with proof of notice of the dishonour. Such an offer is not a waiver of the objection." See also *Standage v. Creighton*, ante, p. 406.

Adjourned Sittings in London after Michaelmas Term, 1832.

BEFORE LORD CHIEF JUSTICE TINDAL.

Dec. 19th.

PARKER v. SMITH and Others.

That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them to a sensible degree less fit for the purposes of business or occupation.

CASE for darkening ancient lights, &c.

It appeared that the plaintiff was possessed of a house in Queen Street, in the city of London, and that the defendants, who were the owners of premises situate very near, which had been injured by fire, had rebuilt them in such a way as to diminish, according to the plaintiff's opinion, the quantity of air and light which he enjoyed in the occupation of his house previous to such rebuilding. Several witnesses, on the part of the plaintiff, stated that, in their opinion, the quantity of sunlight and air was diminished, and the premises, in consequence, depreciated in value.

Bompas, Serjt., for the defendants, admitted that they had not built the new premises after the fire on precisely the same site as the former; but contended that the question was, whether as much air and light were enjoyed afterwards as before. A man is not bound to erect on the same space—" *Sic utere tuo ut alienum non lædas*" is the maxim; and if he does not depart from that, an action is not maintainable against him.

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Several witnesses, on the part of the defendants, stated that, in their opinion, the quantity of light and air was, on the whole, increased; and some added, that the comfort of the residence-part of the plaintiff's premises was increased also, and made more valuable as to rent.

Wilde, Serjt., in reply, did not controvert the law as laid down by *Bompas*, Serjt., but relied upon the proof for the plaintiff that injury was in fact sustained.

TINDAL, C. J., in summing up, said—The question in this case is, whether the plaintiff has the same enjoyment now, which he used to have before, of light and air, in the occupation of his house;—whether the alteration by carrying forward the wall to the height of ten feet has or has not occasioned the injury which he complains of. It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognises, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears that the defendants' premises had been injured by fire, and they re-erected them in a different manner. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they make must not diminish the enjoyment by the plaintiff of light and air. It is contended by the defendants, that, on the whole, the light and air are increased. If, as matters now stand, upon the evidence you

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have heard, you think that this is a true proposition, then the plaintiff will have no ground of action. But if, on the contrary, you think that, in effect, these alterations (though they may separately be improvements), upon the whole diminish the quantity of light and air, then you will find for the plaintiff with nominal damages; and your verdict will have no other effect, than that of a notice to the defendants, that they must pull down the building of which the plaintiff complains.

Verdict for the plaintiff—Damages 1*s*.

Wilde and *Andrews*, Serjts., and *Chandless*, for the plaintiff.

Bompas, Serjt., and *Comyn*, for the defendants.

[Attornies—*Lawrence*, and *Pickering*.]

See the case of *Shadwell* v. *ports*, p. 333, and the authorities *Hutchinson*, Vol. 4 of these Re- there referred to.

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[*Rule as to the arrangement of Causes for the Sittings in and after Term.*]

Jan. 25th.

IN the case of *Latchford* v. *Cresswell*, which was in the paper for trial at the second Sitting in London, *Goulburn*, Serjt., moved on affidavits to postpone the trial, and wished it to be put off till the Sittings after the Term.

GASELEE, J., said, that he could not put off the trial till the Sittings after the Term, as it would interfere with the trial of other causes before the Lord Chief Justice. His Lordship added, that it had been arranged, for the benefit of suitors and counsel, that the causes standing over from the Sittings after one Term should not be made remanent to the Sittings in the next, but to the Sittings after; because some counsel did not profess to attend at Nisi Prius at the Sittings in Term, and they might have had briefs delivered in those causes. The cause was postponed to the First Sitting in Easter Term.]

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HARTLEY v. COOK and Another.

TRESPASS.—The *first* count of the declaration stated, that the defendants, on the 15th January, 1832, assaulted the plaintiff, and laid hold of him, and struck him, and pulled him by his arms and legs, and endeavoured to force him out of a certain reading desk in which he then was, and tore his clothes, &c. The *second* count was for a common assault, omitting the statement respecting the reading desk. The defendants pleaded—Not Guilty, and several pleas of justification.

The *first* plea stated, that, before and at the time when &c. in the first count mentioned, the defendant Cook was one of the churchwardens of the parish of Saint Mary Colechurch, in London, united with the parish of Saint Mildred, Poultry, in London, duly appointed and elected; and that the plaintiff, on the day mentioned, being Sunday, wrongfully and improperly intruded himself into and took possession of the said reading-desk, such reading-desk then and there being in and part of the parish church of the said parishes so united, and being the place assigned and duly set apart for the parish clerk of the said parishes, for the performance by him of his duties as such clerk, in assisting in the celebration of divine service in the said church; and the said plaintiff thereby then and

After the great fire of London, in 1666, the parish of St. Mary Colechurch, was united with that of St. Mildred the Virgin by stat. 22 Car. 2, c. 11. By custom in each of the parishes before their union, the right of appointment to the office of parish clerk, was in the rector and parishioners. In the year 1831, the parishioners of the united parishes, in vestry assembled, elected a parish clerk, but the rector at first refused to sanction the appointment, and himself appointed another person; afterwards, however, he appointed the person elected, with the assent of the parishioners. But the person whom he had previously ap-

pointed, one Sunday morning placed himself in the clerk's desk, in the church of the united parishes, and, refusing to retire upon request, was laid hold of by one of the churchwardens and the vestry clerk, and an attempt was made to remove him by force, but which was not successful. For the purpose of trying the right to the office, he brought an action of assault against those officers, who pleaded specially two sets of justifications; one set alleging the legal appointment of the person elected by the parishioners, to place whom in the desk they sought to remove the plaintiff; and the other set treating the plaintiff himself as an intruder. The jury were of opinion that the custom was for the rector to appoint with the assent of the parishioners, and found a verdict for the defendants. A rule was afterwards obtained for a new trial, which, after argument, and time taken to consider, was discharged; the Court being of opinion that the plaintiff was not lawful parish clerk, as he was appointed by the rector alone, without the concurrence of *either* of the parishes; but they did not decide whether the election by the *united* vestries was right or not, though they said that it appeared to be the natural mode.

In the course of the trial it was ruled that old entries in the vestry-books of the parishes were not evidence to shew the right of election, [as it did not appear whether the incumbent was present at the meetings they related to. But extracts from the register of the bishop of the diocese were received in evidence to prove the same appointments, as were also several entries of vestry meetings, at which the rector was present.

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there hindered and prevented a certain person, to wit, one Thomas Samuel Bullard, who then and there was the parish clerk of and for the said united parishes, duly appointed and entitled to act in that behalf, from taking possession of the said reading-desk, as he was entitled and about to do, for the purpose of assisting in the celebration of divine service, and which service was about to commence, and was accordingly celebrated; and thereby also the plaintiff unlawfully and improperly hindered the due, proper, orderly, and devout celebration of divine service in the said church, to the great scandal of divers devout parishioners, &c.; whereupon the defendant Cook, so being such churchwarden as aforesaid, gently admonished him of the impropriety of his behaviour, and requested him to leave the said reading-desk, that the said Thomas Samuel Bullard might, as such clerk, take possession of it, and that divine service might not be interrupted or delayed, &c.; but the plaintiff refused, and wrongfully remained in possession of the said desk; whereupon the said defendant Cook, so being such churchwarden, and the other defendant, at his request, and in his aid and by his command, gently laid their hands upon the plaintiff, in order to remove him from the said desk, and prevent his further delaying the due celebration of divine service, &c.

The *second* special plea stated, that the plaintiff was in the church on Sunday, just previous to the commencement of divine service, and was illegally, irreverently, and improperly making a noise and disturbance therein, to the scandal of the congregation, and, being admonished by the churchwarden, refused to cease, whereupon the defendants gently laid hands on him, &c.

The *third* special plea stated, that Bullard was the parish clerk of and for the said united parishes, and that the plaintiff, assuming and pretending that *he* had been appointed, intruded himself into the desk, whereupon Bullard requested him to withdraw, which he refused; and thereupon the defendants, at the request of Bullard, gently laid hands on him to remove him.

The *fourth* special plea was similar to the first, except that it stated that the plaintiff *violently resisted* the endeavours of the defendants to remove him from the desk.

The *fifth* special plea was to the second count, and was similar in substance to the first, but more concise in form (a).

(a) As there does not appear to be any form of plea in the books applicable to such a case as the present, we have thought it right to give as a precedent, the fourth special plea verbatim.—“ And for a further plea as to the assaulting the said plaintiff, and the seizing and laying hold of the said plaintiff, and with their fists giving and striking the said plaintiff the said blows and strokes first mentioned; and the pulling the said plaintiff by his arms and legs, and endeavouring to force him from and out of the said reading-desk, and the shaking and pulling about him the said plaintiff, and casting and throwing him the said plaintiff down to and upon the ground, and giving him the said blows and strokes secondly mentioned; and the rending, tearing, and damaging the said clothes and wearing apparel in the said first count mentioned, and therein supposed to be done; the said defendants, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say, that, before and at the said time when &c., in the said first count mentioned, he, the said defendant W. C., was one of the churchwardens of a certain

church, to wit, the parish church of the united parishes of Saint Mildred, Poultry, and Saint Mary Colechurch, in London, duly appointed in that behalf: And that the said plaintiff, just before, and at the said time when &c. in the said first count mentioned, to wit, on the day in that count mentioned, being Sunday, wrongfully and improperly intruded himself into and took possession of the said reading-desk in the said first count mentioned, such reading-desk then and there being in and part of the said parish church of the said united parishes, and being the place assigned and duly set apart for the parish clerk of the said parishes, for the performance by him of his duties as such clerk, in assisting in the celebration of divine service in the said church, and which service, before and at the said time when &c. in the said first count mentioned, was about presently to commence, and was accordingly celebrated in the said church: And by the said conduct of the said plaintiff, the performance of such service in due and regular manner, with the assistance of the parish clerk of the said united parishes, was then and there likely to be obstructed and delayed, to the great scandal of divers devout parishioners of the said united parishes, then and there assembled

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The plaintiff joined issue upon the plea of not guilty, and, to the special pleas, replied *de injuriâ*.

From the evidence in the case, it appeared, that, after the great fire of London, in 1666, the parishes of St. Mildred the Virgin and St. Mary Colechurch, the former being a rectory and the latter a perpetual curacy, were united by the statute of the 22 Car. 2, c. 11, s. 63, which enacts, that "the parish of St. Mildred, Poultry, and St. Mary Colechurch, shall be united into one parish, and the church heretofore belonging to the said parish of St. Mildred, Poultry, shall be the parish church of the said parishes so united." And, by section 68 of the same statute, it is

for the purpose of such service: Whereupon the said defendant W. C., so being such churchwarden as aforesaid, then and there gently admonished the said plaintiff of the impropriety and indecency of such his behaviour, and requested him to come out of and from, and to leave the said reading-desk, in order that the performance of such service, in such due and regular manner as aforesaid, might not be obstructed or delayed; but the said plaintiff then and there neglected and refused so to do, and wrongfully remained in possession of the said reading-desk; whereupon the said defendant W. C., so being such churchwarden as aforesaid, and the defendant W. P., in aid of the said W. C., and by his command, at the same time when &c. in the said first count mentioned, gently laid hands upon the said plaintiff, for the purpose of removing him from the said reading-desk, and preventing his obstructing or delaying the performance of the said service in such due and re-

gular manner as aforesaid, and because the said plaintiff thereupon violently resisted such their endeavour, and continued by force in possession of the said reading-desk as aforesaid, the said defendant W. C. being such churchwarden as aforesaid; and the said W. P., in aid of the said W. C. and by his command, at the said time when &c. in the said first count mentioned, did necessarily and unavoidably commit the residue of the said trespasses in the introductory part of this plea mentioned, as they lawfully might for the cause in that behalf aforesaid, doing no unnecessary damage or violence to the said plaintiff or his apparel, and making no unnecessary disturbance on that occasion, which are the same trespasses in the introductory part of this plea mentioned: And this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them," &c.

provided, "that, notwithstanding such union as aforesaid, each and every of the parishes so united as to all rates, taxes, parochial rights, charges, and duties, and all other privileges, liberties, and respects whatsoever, other than what are hereinbefore mentioned and specified, shall continue and remain distinct, and as heretofore they were before the making of this present act." The remainder of the section provided, that the patrons should present by turns to the living. The facts out of which the assault complained of arose, were as follow:—

On the 13th of April, 1831, the parishioners of the united parishes, in vestry assembled, appointed a person named Bullard to fill the office of parish clerk, for which office the plaintiff Hartley was also a candidate. The rector, who was resident in the country, and therefore not present at the vestry, though he had notice, refused to confirm the appointment made by the parish; and on the 16th of the same month gave Hartley the following appointment:—

"I, Richard Crawley, rector of the united parishes of St. Mildred, Poultry, with St. Mary Cole, in the city and diocese of London, do hereby nominate and appoint Mr. John Hartley to the clerkship of the said united parishes, now vacant by the death of Mr. J. Terry. Witness my hand, &c."

After considerable correspondence upon the subject, and in consequence of a recommendation from the Bishop of the diocese, the rector, on the 9th of October, wrote to the vestry clerk as follows:

"I wrote to Mr. South a few days ago, begging him (as I did not know Mr. Hartley's direction) that he would inform him that I should withdraw his nomination to the clerkship of the united parishes. I have now to beg you will have the goodness to insert in the vestry book, that I have appointed Mr. Bullard to that situation, with the

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consent and approbation of the parishioners in vestry assembled."

After this, it was proposed to have a fresh election, which was agreed to by both Bullard and Hartley, but the parish did not consent. Thus matters stood till the morning of Sunday, the 15th January, 1832, when Hartley (who had previously officiated for the late parish clerk, but was informed by letter on the 11th January that he was not to officiate any more), placed himself in the desk, and, refusing to leave when desired, was by the defendants, one of whom was churchwarden of St. Mary Cole, and the other vestry clerk of the united parishes, laid hold of, and an attempt was made to remove him by force; which not being successful at the time for commencing service, he was allowed to remain. For the purpose of trying the right to the office, Hartley commenced an action of assault. In order to shew that the right was jointly in the rector and parishioners, several ancient entries in the vestry-books of the separate parishes were offered in evidence for the defendants, but rejected on the ground that it did not appear that the incumbent was present at the meetings to which they related. Then several extracts from the registry of the diocese of London were produced, some on the part of the plaintiff, and some on the part of the defendants, the nature of which are sufficiently stated in the summing up; as also, several entries of vestry meetings at which the rector was present.

Jones, Serjt., on the part of the plaintiff, contended, that, under the circumstances, the plaintiff was entitled to a verdict, on the ground that Bullard was not duly appointed at the time of the assault, as the custom for the rector and parishioners of the united parishes to appoint jointly was not made out satisfactorily.

Andrews, Serjt., *contra*, submitted, that the defendants had made out their justification.

TINDAL, C. J., in summing up, said—The plaintiff in this case complains of an assault committed on his person by the two defendants. The answer which they give to the complaint is, that one of them was warden of the church of the united parishes of St. Mary Colechurch, and St. Mildred, in the Poultry; and that, on the day in question, which was a Sunday, the plaintiff wrongfully intruded himself into the reading-desk of the clerk, and that he, the churchwarden, was ordered to put into that desk one Bullard, who the defendants say had been duly and legally appointed parish clerk; that he first of all requested the plaintiff to come out, which he having refused, they laid their hands upon him for the purpose of putting him out of the reading-desk. That fact has been proved on the part of the plaintiff, to raise the question (which is the material one for your consideration), whether Bullard had been rightly and duly appointed parish clerk of these united parishes or not. If the defendants were taking up a person to put in the reading-desk, who had no authority to be there, a man who was as much a stranger as any man there, they could not justify themselves in displacing the plaintiff; the question, therefore, which I shall leave for your consideration is, whether, upon the evidence in the case, you are of opinion that Bullard (the person under whose right the defendants resist this action) was duly appointed parish clerk or not? Now, in point of law, the canon law, which forms part of the law of the land, the early canon law, gives the appointment of a parish clerk to the rector, as a person who, in all probability, could make the best selection of a man fit for the duties of that office, and who could have no interest in appointing an improper person. But there are agreements made between parishioners and clergymen upon this subject. Sometimes the clergyman elects one, and sometimes the election is by the parishioners alone, but the person is afterwards approved of by the clergyman. In this latter case, neither party could appoint a parish clerk, and unless they so agreed that the same individual was fixed upon by both, there would

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be no parish clerk. But, if that practice is shewn to have existed from the earliest times, it may be a legal custom. And if you find in this case, that such a practice has existed as far back as there is any evidence before us, you may then infer that it has existed from that very remote period which constitutes what is called time of legal memory. It is never expected that evidence should be brought before a jury to carry a custom back to the remotest antiquity. All that can be done is, to carry it back as far as documents exist. The question is, whether you are satisfied that it appears to have been the custom in the two parishes before the union took place, and in the united parishes since the union, that the rector and parishioners should unite in the appointment of the clerk; for, if such is your opinion, then I shall tell you that Bullard has been rightly and duly appointed, and in that case your verdict should be for the defendants. But if, on the other hand, you are not satisfied that such proof has been given as will justify you in finding that the custom has existed against the ordinary rule of law, then you will find your verdict for the plaintiff. The action is not brought to recover damages, but to establish the right of election; and therefore, if you find for the plaintiff, you will give nominal damages only. Now, with respect to the point, did the custom exist or did it not; it appears, that there were two parishes before the great fire of London, one called St. Mildred in the Poultry, the other, St. Mary Colechurch. After the fire had taken place, that happened with respect to these two parishes which did also to many others, it was agreed, to avoid expense in building many churches, that both parishes should be united together, and one church should serve for both. It appears to me, that, if this custom existed in each separate parish before the act of Car. 2, that will be ground enough to shew, that, in the united parishes, the law would authorize the same custom, and therefore, what you will have to do will be, to say, whether, before the parishes were united, this custom existed in each separately;

and also, whether it has been continued from that time down to the present. I do not mean without interruption at all, for, if there had been no interruption, we should not be here to try this question. Men do not raise questions in such cases; but it is where, in process of time, irregularities have taken place, so that sometimes the custom has been observed, and sometimes not, that questions arise between different parties. You must look at the preponderance of the evidence, to see whether, although the practice may have varied sometimes, the bulk of the evidence shews that the custom had existed. The earliest transaction which has been given in evidence is of the year 1629; it relates to the parish of St. Mary Colechurch, and in calling your attention to this transaction, I do not advert to the vestry-book, for I think it is doubtful whether a vestry-book on such an occasion is admissible in evidence, as it does not appear whether the clergyman was present. I rely upon the license, which was a public act, to complete the title, not to give it, but to complete it by the approval of the ordinary. The license is to a person to be the bearer of water; it was at that time the office of the clerk to carry about the holy water to the different parishioners; that office, however, bears an analogy to the situation which the modern clerk fills; it is a license to the person to be the water-bearer, it begins thus:—"Whereas, the rector of the parish of St. Mary Colechurch, and *the parishioners there*, have rightly and duly chosen Thomas Letten to fill the office," &c. Now that is going back to a very early time, two centuries ago, and there is not any earlier document which shews, or from which we may infer, that the appointment was in the rector alone at that time. There does not appear to have been any controversy in the Ecclesiastical Court, which there would have been if the right was disputed. The license purports to be signed by the rector, and it seems to recognise the right of the parish to have a voice in the appointment of the clerk. The next document is of the date of 1664, and

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applies to the same parish of St. Mary Colechurch. It appears that a person named William Wilson was appointed to be assistant to Thomas Letten, and this was done by the choice of the parishioners and the clergyman. The document is signed "Thomas Horton." One would suppose that he was the rector at the time, from his name being first and the names of the churchwardens following it. This is all that applies to St. Mary Colechurch before the union of that parish with St. Mildred. As to the parish of St. Mildred, a license is produced, of the date of 1661, in which it is said: "These are to certify that John Leeson was chosen parish clerk of St. Mildred in the Poultry, by the general consent of the parish;" it is signed "Perrincheife, D.D." Here, therefore, is the assent of the clergyman shewn by his signing the certificate; and you have the act admitted to have taken place, *viz.* that the man was appointed in his (the clergyman's) presence. There is a license also in 1663, and another in 1670, which latter is the very year in which the parishes were united. It is in these words. "We, whose names are hereunto subscribed, do recommend the appointment of William Wilson, the person who has been assisting the late parish clerk, to be the parish clerk, to be his successor." This document is signed by the parishioners, and Thomas Perrincheife, the rector. Now this, though not strictly an election by the parish, yet is an acknowledgment on the part of the rector, that the parish had a voice in the matter as well as himself. These are the only instances we have before the union, in 1670. One or two more of a subsequent date are put in. Then we come down to a more important entry, namely, that of the year 1787. It has been shewn that the rector at that time was Dr. Bromley. It was proved also, that he had made two, if not three, appointments, which it appears were resisted by the parish; and a meeting of the parishioners was called, and a report made by the vestry clerk, that, upon searching for precedents, it appeared, that

the right was not in one alone, but in the rector, churchwardens, and parishioners. The entry in the vestry book of the 16th February, 1787, says, "for the prevention of disputes in time to come, it is resolved, that the right of choice, nomination, and appointment to the office of parish clerk for these united parishes is in the rector for the time being, with the consent and assent of the churchwardens, parishioners, and inhabitants of the same respectively." This, it appears, was signed by the rector, and it will be for you to say, whether it does or does not impress your mind with the intention of the parties on the subject. It is followed up by the rector's withdrawing one appointment and choosing another person. This is all the evidence on the part of the defendants. On the part of the plaintiff they say, that they will shew you instances in which a different course has been adopted. The first they put in is of the date of 1712. It is a certificate of the rector at the time that a particular person had been duly elected clerk. It seems to me to be rather an acknowledgment of the rector's having allowed the right of the parish to elect, than a proof of his standing on a separate right to appoint. The next they put in is of 1739, by which it appears that the rector of the day himself appointed the clerk. If that man ever acted as clerk, it is, as far as that instance goes, a proof that the rector was allowed to have the right of appointing alone. It should be observed, that one of the instances relied on by the defendants is an instance of an appointment by the churchwardens alone. We do not know whether their appointment was assented to, or how long the office remained under the separate appointment of one or the other. These different appointments shew that there was something of a contest going on, a difference of opinion between the rector and the parish, which made the agreement of 1787 necessary and proper. His lordship, after some further observations, told the jury, that, if the custom was established, the plaintiff's appointment would not be valid;

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and directed them, if they thought the custom was proved, to find a verdict for the defendants; but, if they thought it was not, then to find a verdict for the plaintiff, with nominal damages.

Verdict for the defendants.

Jones, Serjt., and ———, for the plaintiff.

Andrews and *Stephen*, Serjts., for the defendants.

[Attornies—*Richardson & Co.*, and *Payne & Leachman*.]

IN the ensuing Hilary Term, *Jones*, Serjt., obtained a rule *nisi*, for a new trial, which came on for argument in the course of the same Term.

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The Court took time to consider, and on the last day of Easter Term pronounced its judgment.

TINDAL, C. J., after stating the pleadings, said—It was urged that, by the union of the two parishes by statute, the custom in each was destroyed, and the common law applies; and therefore, that the plaintiff, being nominated by the rector, must be held to be parish clerk. It seems to us sufficient to decide whether the plaintiff was lawful parish clerk, and the question whether *Bullard* was, is upon the pleadings immaterial. *Hawe v. Planner*(a). There is no doubt, that in each parish, before the union, the custom was to appoint by the rector and parishioners. The only question is on the effect of the statute of union. *Bro. Ab.* tit. “Appropriation, Union, and Consolidation,” shews that churches may, in certain cases, be united at common law, but that such union does not affect the parishes as to tithes, rates, &c. 1 *Lord*

(a) 1 Saund. Rep. 13.

Raymond, 196, shews, that, if this had been an union of the two churches at common law, the church of St. Mildred would have been the church to which the union was effected, the parishes in all other respects being distinct. It is difficult, therefore, to hold, on the principle of the common law, that either parish (more especially St. Mildred's) should have been deprived of any right as to election it before possessed, *and therefore an appointment by the rector alone would be bad*. But the true question is upon the statute: and the 65th section, as to plate and goods, clearly shews that the union was an union of parishes, and not merely of churches. But the 68th provides, that, as to all privileges, &c., the parishes shall remain distinct. Therefore, as before the union there was a right in the rector and parishioners jointly, and as St. Mildred's was the church to which the union was made, St. Mildred's cannot have lost the right of election in question. We express no opinion whether the election in the united vestries is right or not, though it seems to be the natural mode; but it is enough for us to decide that the appointment of Hartley is bad, and therefore that the action cannot be maintained.

Rule discharged.

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COURT OF KING'S BENCH.

Sittings at Westminster after Hilary Term, 1833,

BEFORE LORD CHIEF JUSTICE DENMAN.

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In an action for negligently driving the defendant's carriage against that of the plaintiff, the latter cannot examine his servant who drove his carriage, without releasing him.

WAKE v. LOCK.

CASE against the defendant for damaging a fly of the plaintiff, by the defendant's waggon running against it, through the negligence of the defendant's servant. Plea —General issue.

It appeared that the defendant's waggon had struck against the plaintiff's fly, on its return from Epsom races.

On the part of the plaintiff, his servant, who drove the fly, was called; he gave evidence to shew that the injury had arisen from the negligence of the defendant's waggoner.

Campbell, S. G., for the defendant, objected that the plaintiff's servant was not a competent witness without a release; and he relied on the case of *Morish v. Foote* (a).

Sir *J. Scarlett*, *contrà*,—I have seen a plaintiff's servant examined in cases of this sort over and over again.

DENMAN, C. J.—I have very often seen the plaintiff's servant examined without a release.

Campbell, S. G.—I have heard the case which I rely upon referred to with approbation.

DENMAN, C. J., If I had been aware of the case, I would not have received the witness's evidence without a release.

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Sir *J. Scarlett*.—If the thing was of sufficient value I should be content to argue the case.

The plaintiff being in Court, the witness was released.

Campbell, S. G.—As the plaintiff has examined the witness without a release, he ought not to be allowed to release him now; but should go on with the examination, at the risk of the verdict being set aside.

DENMAN, C. J.—The witness is now released, and I will ask him, if what he has already told us is true.

The witness was examined.

Verdict for the plaintiff, damages 4*l.* 4*s.* (b).

Sir *J. Scarlett* and *Platt*, for the plaintiff.

Campbell, S. G., and *Steer*, for the defendant.

[Attornies—*Brough*, and *Lock*.]

(b) In the case of *Green v. The New River Company*, 4 T. R. 589, it was held, that, in an action against a master, for the negligence of a servant, the latter is not a competent witness on the part of the defendants, to disprove the negligence without a release. In the case of *Miller v. Falconer*, 1 Camp. 251, which was an action for running against the plaintiff's cart with a dray, it was held that the servant, who was driving the cart when the accident happened, was not a competent witness for the plaintiff without a release; but

in the case of *Cuthbert v. Gostling*, 3 Camp. 515, where, in trespass for breaking through the wall of the plaintiff's house, the defendant pleaded a license, to which the plaintiff new assigned excess, it appeared that the plaintiff had given the defendant leave to do what was necessary for the repairing of his own house, which adjoined the plaintiff's; it was held, that the workmen employed to do the repairs, were competent witnesses on the part of the defendant, to disprove the excess, without being released. In the case of *Prothe-*

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roe v. Elton, reported under the name of *Rotheroe v. Elton*, 1 Pea. N. P. C., 117, it was held, in an action on a policy of insurance on goods put on board a ship, that the shipowner was not a competent witness for the plaintiff, to prove the ship sea-worthy, without a release. The case of *Morish v. Foote*, 8 Taunt. 454, was an action against the proprietor of a mail coach, for the negligent driving of his servant, whereby the plaintiff's waggon horse was injured. For the plaintiff, the waggoner was examined in chief, and the defendant's counsel then objected, that he ought

to have been released; but nothing having appeared to inculpate him at the time when the objection was made, Mr. Justice *Abbott* repudiated the objection; but the case afterwards went to the jury on the question, whether, at the time of the accident, the coachman was to blame or the waggoner: and Mr. Justice *Abbott* gave leave to move to enter a nonsuit, if the Court should think that the waggoner ought to have been released; and the Court held that the waggoner was not a competent witness without a release; and a nonsuit was entered.

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SEAGER and Others v. BILLINGTON.

A. advanced 100*l.* to B., on the joint and several promissory note of B. and C., the latter at the time owing A. 65*l.* on his own account; C. failed, and, at a meeting of his creditors, A. and others entered into a resolution that C. should assign certain property for the benefit of his creditors, and that his creditors should give him a release. A., at this meeting, stated his debt to be 65*l.*, and he afterwards received a dividend on that sum. Subsequently to this B. failed:—*Held*, that A. could not then sue C. on the promissory note.

ASSUMPSIT by the plaintiffs, as the payees, against the defendant, as maker, of the following promissory note:—

“ 4th December, 1829.

“ On demand, we jointly and severally promise to pay Messrs. Seager, Evans, Stafford, & Co., one hundred pounds, with interest.

“ Witness,
“ Christopher Wilson.

Frederick Barnet.
George Billington.”

Plea—General issue.

It was opened by *Campbell*, S. G., for the plaintiffs, that a person named Barnet was about taking certain premises, and that he borrowed 150*l.* of the plaintiffs, the defendant being his surety on this note to the amount of 100*l.*; the defendant himself, besides this, owing the plain-

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that A. could not then sue C. on the promissory note.

tiffs 65*l.* 7*s.* 1*d.* on his own private account. Subsequently to this, the defendant had proposed to compound with his creditors, Barnet up to that time continuing in credit; the plaintiffs therefore stated themselves to be the creditors of the defendant, to the amount of 65*l.* 7*s.* 1*d.*, on which they had received a dividend; however, since that time, Barnet had failed, and on the plaintiffs claiming the amount of this note from the defendant, a release was tendered to the plaintiffs, which they refused to execute. But, even if they had executed it, he submitted that that would not have defeated the present claim; and he cited the case of *Payler v. Homersham (a)*.

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(a) 4 M. & S. 423. In that case a release, contained in a deed, which recited that the defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of the defendant 15*s.* in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15*s.* in the pound paid to them before executing the release, each and every of them did release the defendant "from all manner of actions, debts, claims, and demands in law and equity, which they, or any or either of them had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of the release"—was held to release nothing but the respective debts and all actions and demands touching them: for the general words of a release have reference to the particular recital, and are to be governed by it. Therefore, where to debt brought by the plaintiffs on the defendant's bond,

the defendant pleaded this release, it was held, that the plaintiffs, in their replication, might plead that the bond was given by the defendant, with others, as a security for the repayment of bills drawn upon them by the defendant, and for monies advanced to him, and that the sum set against their names in the release, was due to them from the defendant on the day of the release, on his own account; and the monies intended to be secured by the bond, although part was due at the time of executing the release were not nor was any part included, or meant by them or by the defendant to be included, in the sums set against their names, or in the release. In the case of *Cork v. Saunders*, 1 B. & A. 46, the defendant, being insolvent, had, by an agreement, stipulated to assign his property immediately, his creditors consenting that his business should be carried on for their benefit until the next Michaelmas, and that then the property should be divided among them. The defendant according-

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It was proved that Barnet wished the plaintiffs to advance him 150*l.*, and that they refused to do so, unless the defendant would become his surety for 100*l.*; which he did, by signing this note.

The note was put in and read.

Sir *J. Scarlett*, for the defendant.—If this action could succeed, it would be a fraud on all the other creditors of the defendant. The creditors of the defendant signed a resolution to take a certain composition upon debts specified, and they agreed to execute a release. I say, that a creditor cannot state that his debt is 65*l.* instead of 165*l.*, and then, having received his dividend on 65*l.*, refuse to sign a release, and get 100*l.* more than all the rest. The case cited turns on the construction of a deed; but I go on the general principle. Has any one creditor, I would ask, a right to keep in his pocket, in this way, a claim for 100*l.*? The fact was, that the plaintiffs had this note payable on demand by Barnet and the defendant, and they took their chance of getting the money from Barnet. If this claim had been mentioned to the other creditors, they would at once have said, it would have been better to have had a bankruptcy, and then the plaintiffs could only have got a dividend. I take the law to be this, that if a man agrees to assign his property to pay his creditors equally, no creditor, having put his name to such an agreement, can claim any larger amount afterwards. This note is a note payable on demand, and it does not signify whether the defendant was a surety or not. It has been de-

ly assigned his property; but, at Michaelmas, several of the creditors who had signed the agreement agreed that the business should be carried on for a further time. Held, that the plaintiff, who was a creditor, and had signed the first agreement, but had not concurred in the second, could

not maintain an action against the defendant for a debt existing at the time of the first agreement. See also the case of *Ward v. Bird*, *ante*, p. 229; the case of *Turner v. Hook*, D. & R. N. P. C. 27, there cited; and the case of *Margetson v. Aitken*, *ante*, Vol. 3, p. 338.

cided, that, if a debtor owes two debts to the same creditor, and the debtor and creditor agree that the creditor shall state only one of them in the agreement for a composition, and the debtor either promise to pay the other or give a bill for it; such an arrangement cannot be enforced, as it is a fraud on the other creditors. So, here, the plaintiffs cannot keep one of their debts in reserve, and then get paid more than all the other creditors of the defendant.

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A paper, stamped as an agreement, bearing date, April 10, 1830, and signed by Mr. Stafford, one of the plaintiffs, and by several other of the defendant's creditors, was put in. It stated, that, at a meeting of the creditors of the defendant, it was resolved that the defendant should assign certain property for the benefit of his creditors, who should execute a release.

It was proved that Mr. Stafford had stated at this meeting, that the debt due from the defendant to the plaintiffs, was 65*l.* 7*s.* 1*d.*, and that a composition of 3*s.* 10*d.* in the pound had been subsequently received by the plaintiffs on that amount.

DENMAN, C. J.—By this agreement, the creditors who sign it are to execute a general release to the defendant. I think it is an answer to the action. I shall nonsuit the plaintiffs, giving them leave to move to enter a verdict.

Nonsuit, with leave to move (a).

Campbell, S. G., Kelly, and Helps, for the plaintiffs.

Sir J. Scarlett and Maule, for the defendant.

[Attornies—*W. Evans*, and *Iviney*.]

(a) No motion was made.

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Feb. 12th.

The TRUSTEES of the BRITISH MUSEUM *v.* FINNIS and Others (a).

If a person opens his land, so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it and use it as a way; and if the person does not mean to dedicate it as a way, but only to give a license, he should do some act to shew that he gives a license only. The common course is to shut it up one day in the year.

If there is an old way near to a person's land, and, by the fences decaying, the public come on the land, that is no dedication of the land as a way. By the stat. 57 Geo. 3, c. xxix, s. 114, the commissioners of paving of the

metropolis are to enter their proceedings in a book, and such entries are made evidence. Whether an entry, stating that A. sent a letter to the commissioners, asking their permission to erect a rail at the side of a street, is evidence of such asking of permission.—*Quære.*

TRESPASS against two of the defendants, as clerks of the paving committee of St. Giles in the Fields, and St. George, Bloomsbury. The trespass was the taking up of some small stones, which paved a portion of ground on the outside of the south wall of the British Museum, and between it and the regular foot-pavement on the north side of Great Russell-street, Bloomsbury.

On the part of the plaintiffs, a conveyance, in the year 1675, from the Hon. W. Russell to the Duke of Montagu was put in, in which the present south wall of the British Museum was described; and by this the property conveyed was stated to extend to a breadth of five feet four inches on the outside of the wall, and abutting on Great Russell-street. A conveyance in the year 1753, from the Duke of Montagu to the Trustees of the British Museum, was also put in, containing exactly the same description.

A witness, named Soley, stated that he recollected the portion of ground in question to have been fenced in by a wooden railing, which, having decayed, was taken away and not replaced by any other fence, but he could not accurately recollect the date of the existence of this fence.

It was also proved, that the small stones with which this

(a) The defendants, Mr. R. Finnis and Mr. R. F. Finnis, were sued as clerks of the committee for paving, cleansing, and lighting the parishes of St. Giles in the Fields, and St. George, Bloomsbury, who are, by sect. 65 of the local paving act of those

parishes, 59 Geo. 3, c. lxxiii, to sue and be sued in the name of their clerk or clerks; and, by sect. 68 of the same stat., persons acting under or by colour of that act may plead the general issue, and give special matter in evidence.

place was paved, were brought from the court-yard of the Museum; and that, in the years 1826 and 1827, when leave had been obtained by the Trustees of the British Museum from the committee of paving to remove the pavement for the making of a sewer, part of the pavement was replaced by the committee, and part by the Trustees of the Museum. It was also proved that the servants of the Museum cleaned away the dirt and snow up to the termination of the small stones, and to that line only.

On the part of the defendants, it was proved that the place in question was completely open, and that it had been so for forty years; and that any one passing along Russell-street might pass over it exactly the same as he might over the flag pavement which adjoined it. The defendants' counsel also proposed to give in evidence two entries contained in the minute-book of the committee, as shewing that the officers of the Museum had acknowledged that the ground in question was within the jurisdiction of the defendants. The entries were as follows:—

“ 11th April, 1822.

“ Application in writing from Joseph Planta, Esq., on behalf of the Trustees of the British Museum, was received and read, stating, that complaints had been laid before them by several inhabitants of the neighbourhood, that various nuisances are continually committed against the front wall of their premises, they had resolved to cause an iron fence to be placed against the whole length of the wall, at the distance of not more than five feet therefrom; that a doubt having arisen, whether they were at liberty to execute this plan without the approbation of the committee, they had determined to suspend the work till such time as they shall have received the assurance of this committee that they have no objection to its being effected.

“ Resolved, that the directing committee do consider

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the said application, and report their opinion thereon to this committee."

" 19th April, 1822.

" The sub-committee, appointed at the last meeting, reported, that they had approved of the Trustees of the British Museum placing an iron railing in front of their wall, at the distance of not more than five feet at the east side of the entrance, and three feet at the west, next the sentry-box, and running off to nothing at the extreme end. The said report was confirmed; and Hawkins, the superintendant, directed to prepare two plans of the intended line of the railing, the same to be signed by three committee-men, and one of them sent to Mr. Planta."

Campbell, S. G., for the plaintiffs, objected that these entries were not evidence.

F. Pollock, for the defendants.—By the statute 57 Geo. 3, c. xxix, s. 114(a), the acts, orders, and proceedings of

(b) By which it is enacted, "That all acts, orders, and proceedings of the said commissioners, trustees, or other persons as aforesaid," [which are the commissioners, or trustees, or other persons having the control of the pavements, in the streets or public places in any parochial or other district, within the jurisdiction of this act,] "at any of their meetings, shall be entered in a book or books to be kept by their clerk or clerks for the time being for that purpose, and shall be signed by such clerk or clerks; and that all such orders and proceedings shall then be deemed and taken to be original acts, orders, and proceedings; and such book or

books shall and may be produced and read as evidence of all such acts, orders, and proceedings, upon any appeal, or trial, or information, or any proceeding, civil or criminal, and in any Court or Courts of law or equity whatsoever; and that it shall not be necessary upon any appeal, or trial, or information or proceeding, or upon any occasion, to prove the appointment of such clerk or clerks; and that within ten years after the date of any such acts, orders, and proceedings, proof of the handwriting of such clerk or clerks shall alone be necessary to verify his or their appointment, and the accuracy of such entries of such acts, orders, and proceedings; and

the paving commissioners in the metropolis are to be entered in a book, and that book is made evidence.

PATTESON, J.—It is not evidence of an application.

F. Pollock.—I submit, that it is evidence of something done upon an application.

PATTESON, J.—The application ought to have been preserved. It is only eleven years ago.

F. Pollock.—There is a permission to put up a rail.

Evidence was given, that the papers belonging to the committee would be in the possession of the Messrs. Finnis, as clerks to the committee; and a witness proved that he had made diligent search among the papers of the committee, but that he could not find the letter of Mr. Planta.

that, after the expiration of ten years from the date of any such acts, orders, and proceedings, no other proof shall be necessary, or shall be required of his or their appointment, or of the accuracy of such entries, than the production of such book or books appearing to be signed by some person or persons as the clerk or clerks for the time being; and that any proof of his or their handwriting shall not be necessary, nor shall be required: and also, that upon any appeal, or trial or information or other proceeding, civil or criminal, and in any Court or Courts of law or equity, a certificate from the clerk or clerks for the time being, signed by him or them, that any person or persons who hath or have acted

or may act as commissioners or trustees, or other persons having the control of the pavements in any parochial or other district, or as a surveyor or surveyors of pavements, or in any other office, was or were or is or are one or more of such commissioners or trustees or persons having the control of the pavements in such parochial or other district, or was duly appointed to be and was a surveyor or surveyors of pavements, or to such other office wherein such person or persons shall or may have acted, or shall or may act or appear, shall be sufficient and conclusive evidence of the appointment and authority of such person or persons, without any other proof or evidence whatsoever."

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PATTESON, J.—There is no distinct evidence, without these entries, that any letter ever was sent. I shall receive the evidence, and take a note of the objection.

The entries were read.

Campbell, S. G., in reply.—There can be no dedication of a way to the public, without an intention to dedicate, and without the proprietors having renounced all control over the place for ever. The acts done here shew clearly, that, although the public might pass over this place, there was no intention to dedicate it to the public as a way. The evidence is as clear as that of the bar put up in Southampton-street, every body walks there, but the putting up of the bar negatives a dedication. With respect to the letter of Mr. Planta, that only shews that a doubt existed in his mind, and that, to prevent any possibility of litigation, he wished for the approbation of the committee in what he was going to do.

PATTESON, J., (in summing up).—The whole question is, whether the public have acquired a right of way over this place, by the dedication of the Trustees of the British Museum. If there be any space of ground between the wall of the Museum and the way, there has been a trespass committed; as it is admitted that the soil has been turned up in the space between the pavement put down by the committee and the wall. It is quite clear that there has been a usage of the public going over this space of ground, as it is shewn that they have done so for more than thirty years, which is quite enough, if usage alone would establish the right. On the part of the plaintiffs, it appears, that, in the year 1675, there was a conveyance of the property, which describes it as extending five feet four inches on the outside of the wall, and abutting on Great Russell-street, that being, no doubt, the very wall that is now standing. That conveyance was to the

Duke of Montagu; and we find, that, even at that time, there was a way, but it was five feet four inches from this wall. If a person lets people go over his land, and use it as a way, that is one thing; but if there is an old way near my land, and, by my fences decaying, the public come on my land, that is no dedication. In the year 1753, the Duke of Montagu conveyed the property to the Trustees of the British Museum, in exactly the same terms as were contained in the former conveyance; and, what is most important, Mr. Soley speaks to the place having been fenced in with a rail, which afterwards decayed. He appears to be uncertain as to the time when that was; but, up to that time at least, there could be no dedication. If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a license, he should do some act to shew that he gives a license only. The common course is, to shut it up one day in every year, which I believe is the case at Lincoln's Inn. The question really is, did the Trustees of the British Museum ever dedicate this place as a way? To shew that they did not, there is, besides the testimony of Mr. Soley, evidence given that this particular spot is paved with small stones brought from the inner court of the Museum by the workmen of the Museum, who paved it. If there was a dedication, why should the small stones remain when the old way was flagged and repaired by the paving committee? There are two instances of work done, in 1826 and 1827, and on those occasions the person who did the work got leave from the committee to remove the pavement and make a sewer. But there a permission was necessary, because the work extended more than five feet four inches from the wall, and beyond that the Trustees had not the right of soil; and besides, even if they had, they would not have been authorized to take up the pavement. It appears too, that the committee, in 1826 and

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1827, replaced a part of the pavement, and the workmen of the Museum the rest, after the leave had been given by the committee to take up the pavement. It is rather remarkable, that the Trustees should have replaced a part, and the committee the rest; but, if part of the ground was theirs, that might be a reason for it. It is also proved that the servants of the Museum cleaned away the dirt and snow up to the termination of the small stones, and to that line only. The question is, whether, there being clearly an old highway adjoining the place in question, the Trustees of the British Museum ever dedicated this portion of land to the public. If there has been only a license, that is not sufficient, the question being, whether there has been a total dereliction on the part of the Trustees in favour of the public.

Verdict for the plaintiffs—Damages 1s. (c).

(c) In the case of the *Rugby Charity v. Merryweather*, 11 East, 376, Lord Kenyon said, that the public at large, having the free use of a way for five or six years, had been held a sufficient time to presume a dedication of it to the public, and that the fact of its not being a thoroughfare made no difference. And in the case of *Rex v. Lloyd*, 1 Camp. 260, Lord Ellenborough appears to have been of opinion that it was not necessary that a way should be a thoroughfare. However, in the case of *Wood v. Veal*, 5 B. & A. 454, the Court appear to have great doubt whether it is not essential that it should be so. In that case the Court held, that there could be no dedication of a way except by the owner of the fee; in that case the user was during a long lease. In the case of *Jarvis v.*

Dean, 3 Bing. 447; 11 Moo. 354, where persons had, for four or five years, passed up and down an unfinished street, the inhabitants of which paid highway and paving rates, Best, C. J., told the Jury, that if they thought the street had been used for years as a public thoroughfare, with the assent of the owners of the soil, they might presume a dedication. The Jury did so, and the Court refused a rule for a new trial. But, in the case of *Harper v. Charlesworth*, 6 D. & R. 572, where a way over crown land had been extinguished by an inclosure act, but the public had continued to use the way for twenty years afterwards; it was held, that this user was not evidence of a dedication of the way to the public, unless it appeared to have had the consent of the crown. In the case of *Rex v.*

Campbell, S. G., applied to the learned Judge, to certify that the freehold came in question, to entitle the plaintiffs to their costs.

Barr, 4 Camp. 16, Lord *Ellenborough* said, "After a long lapse of time and a frequent change of tenants, from the notorious and uninterrupted use of a way by the public, I should presume that the landlord had notice of the way being used, and that it was so used with his concurrence. Notice to the steward is notice to the landlord." In the case of *Rex v. Lloyd*, 1 Camp. 260, his Lordship said, "If the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public." But, in *Roberts v. Karr*, Id. 262, where a bar had been at first put up, which was soon knocked down, and the place after that used as a thoroughfare, Mr. Justice *Heath* observed, that the putting up of the bar rebutted the presumption of a dedication to the public; and that such a dedication must be made openly, and with a deliberate purpose. So, in *Lethbridge v. Winter*, Ib., where originally a gate had been put up, but which had been down for twelve years, it was held, that there was no dedication. In the case of *Wood- yer v. Hadden*, 5 Taunt. 125, the plaintiff had erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining

close, which was separated from the end of the street for twenty-one years, by the defendant's fence; during nineteen years of which period the houses were completed, and the street publicly watched, cleansed, and lighted, and both the footways and half the horseway thereof, paved at the expense of the inhabitants; held, that the street was not so dedicated to the public, that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway. In the case of the *Marquis of Stafford v. Coyney*, 7 B. & C. 257, where the plaintiff had for several years suffered the public to use a road through his estate, for all purposes except that of carrying coal; it was held, that this was either a limited dedication of the road, or no dedication at all, but only a license, revocable, and that a person carrying coals along the road, after notice not to do so, was a trespasser. In this case, Mr. Justice *Bayley* and Mr. Justice *Hobroyd* intimated that they saw no objection to there being a partial dedication of a way; but Mr. Justice *Littledale* doubted the possibility of making such a dedication. In the case of *Roberts v. Karr*, Mr. Justice *Heath* said, that there cannot be a partial dedication to the public, although there might be a grant of a footway only.

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PATTESON, J.—The freehold can hardly be said to come in question.

Campbell, S. G.—But, for the private act of Parliament, the defendants must have pleaded a justification.

PATTESON, J.—Perhaps I had better certify.

Certificate granted.

Campbell, S. G., and *W. H. Watson*, for the plaintiffs.

F. Pollock, *Platt*, and *Steer*, for the defendants.

[Attornies—*Bray & Warren*, and *R. & R. F. Finnis*.]

Adjourned Sittings in London after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE DENMAN.



REX v. HEMP.

Feb. 18th.

If an indictment for perjury contain several assignments of perjury, on one of which no evidence is given on the part of the prosecution, the defendant cannot go into proof, to shew that the evidence, charged by that assign-

ment of perjury to be false, was in reality true. A witness for the defence cannot be asked whether he has heard a witness for the prosecution commit perjury on the trial of a cause; and in stating whether he would believe that witness on his oath, he must do so from his knowledge of the witness's general character, and not from having heard him give particular evidence on a particular trial.

On the trial of an indictment for perjury, the witnesses to character were asked, "What is the character of the defendant for veracity and honour?" and "Do you consider him a man likely to commit perjury?"

that contract. There were assignments of perjury on the whole of these statements; but no evidence was given on the part of the prosecution in support of that assignment of perjury, which charged that the paper marked B. did not contain the terms of the contract.

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The defendant's counsel proposed to give evidence to shew that the paper did, in fact, contain the terms of the contract.

Campbell, S. G.—I do not go upon that assignment of perjury. I have given no evidence upon it.

Platt, for the defendant.—It is a question on the record, and we may give evidence to disprove it.

DENMAN, C. J.—I think not, as the prosecutor gives no evidence upon it.

On the part of the prosecution, Moses Jacobs had been examined as a witness; and for the defence, Mr. Pellat was called, he was asked by—

Platt, for the defendant, whether, from having heard Moses Jacobs give false evidence on the trial of a former cause, he considered that the testimony of Jacobs could be relied on?

DENMAN, C. J.—The question is, from what you know of the general character of Jacobs, would you believe him on his oath?

Mr. Pellatt.—I do not know enough of his general character to speak to that.

Platt.—Did you ever hear him commit perjury?

Campbell, S. G.—I must object to that.

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DENMAN, C. J.—That question cannot be put, as it would be trying another specific charge.

A Juror.—I should like for Mr. Pellatt to state whether he would not believe the witness because he has heard him commit perjury.

DENMAN, C. J.—It must be from his general character.

Mr. Pellatt.—I have not such a knowledge of his general character as to enable me to answer the question; but what I do know of him is not in his favour.

For the defendant, several witnesses to character were examined. They were each asked, “What is the general character of the defendant for veracity and honour?” And also, “Do you consider him a man likely to commit perjury?”

The form of the last question was neither objected to by the Solicitor-General, nor remarked on by the Lord Chief Justice.

Verdict—Not guilty.

Campbell, S. G., and Hutchinson, for the prosecution.

Curwood and Platt, for the defendant.

[Attornies—*Spyers*, and *E. Isaacs*.]

See the case of *Rex v. Bisham*, *ante*, Vol. 4, p. 392, and *Rex v. Nichols*, *post*.

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HEISCH v. CARRINGTON and Others.

ASSUMPSIT for goods sold and delivered.

On the part of the plaintiff, who, it appeared, traded under the name of Cox, Heisch & Co., a corn-factor, named Gibson, was called as a witness. He stated, that, on the 12th of December, 1831, he sold to the defendants, who traded as distillers, under the firm of T. V. Cooke & Co., a quantity of barley; and gave the following sold note, made out by his clerk:—

“ Sold Messrs. T. V. Cooke & Co., about 280 quarters of barley, at 32s., for Wm. Gibson.—T. W.”

He also stated, that the barley belonged to the plaintiff; that *the time of payment was two months*; and, that he gave the defendants a delivery order the same day, addressed to the master of the ship Charlotte, at Limehouse, on board which it was. The order was as follows:—

“ Corn Exchange, 12th December, 1831.

“ Captain ——,

“ Deliver to Messrs. T. V. Cooke, about 280 quarters of barley, for Wm. Gibson.”

He further stated, that he sent an invoice on the 23rd of December, and, on the 26th, received the sum of 411*l.* 13*s.* 7*d.*, allowing a discount of 2*l.* 14*s.*; that he was not in possession of the bill of lading; that he stopped payment on the 4th of January, 1832, and had not paid over the money to the plaintiff.

On his cross-examination, he said—“ It is usual for captains of ships to deliver to the order of the factor. I continued to buy and sell for myself up to the time of my failure. I did not deal largely on my own account. There is no defined custom as to the payment; *it is at the option of the buyer to pay at two months, or sooner, with a discount.* The plaintiff has done it more than once. I have

Feb. 23rd.

By custom in the Corn Market, a buyer may pay the factor upon discount, within the two months which constitute the ordinary time of payment, either for his own accommodation or that of the factor: and, therefore, where a factor stops payment after he had received the money for corn sold, but before the expiration of the two months, it was —*Held*, that the principal could not sue the buyer, but must look to the factor.

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known other buyers do the same many times. I should think it is done almost daily. I have no doubt about it. There is printed on the delivery order—‘No refusal will be accepted, unless a satisfactory reason is given at my stand before ten o’clock next market day.’ This means, if there is any objection to the quality. *I send my own waterman to the ship for the sample.* I did not stand *del credere* in this transaction. It is usual for corn-factors to stand *del credere*. I think I have heard in one or two instances, under peculiar circumstances, that they have not stood *del credere*. I had been selling for the plaintiff for a long time. He merely gave me the particulars, which imported that I was to sell. The time of payment is never mentioned in the sold note. Payment is frequently made within two months; and then the factor usually pays his principal at the end of the two months. There is no fixed rate of discount. Sometimes the payment within two months is for the factor’s accommodation; it was for mine in this case. I do not know of any instance of a factor’s refusing to take the money before the end of the two months. I always take it, having but little. I know of two instances where the plaintiff has received a portion of money on account within the two months; and this is very common with others.”

Sir *J. Scarlett*, for the defendants.—No case has been made out on the part of the plaintiff. The difference between a factor and a broker is this—the factor has possession of the property, but the broker has no control over the commodity, as the factor has. A broker is the agent between both parties; he has no power to make a final contract; what he does, must be ratified by his principals. A factor sends no bought note, and keeps no contract book, as a broker must. In this case, on the face of the delivery order, the factor reserves to himself the power, and determines himself as to any objection by the buyer on the ground of any difference between the bulk and the sample.

Campbell, S. G.—The case of *Baring v. Corrie* (a) decides that a factor is substantially a broker.

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Sir *J. Scarlett*.—That was a peculiar case. Corrie was a broker at Liverpool, and the goods were also at Liverpool, and consequently he had the power over them. I speak of the *general* distinction. Peculiar circumstances may arise, as in the case referred to; but, I say in this case, that Gibson was really a factor. He sent his own clerk for the sample, and signed the delivery-order in his own name. How were we to know whether he was an agent or not? I agree, that an agent cannot vary the contract without his principal's consent; but, not so when he sells in his own name, and the buyer knows nothing about the principal. With respect to the custom, I admit, that when there is a precise contract in writing, it cannot be qualified by evidence of usage, unless it is ambiguous. There is no limit of time in the contract, it rests upon usage, which must be taken altogether. I say, the usage is, that payment under the contract is not demandable before the end of the two months; but, the buyer has a right to pay sooner if he wishes it, or if the factor wishes it, and he assents. If these words were in a contract, it could not be said to be against law; and the custom, therefore, cannot be said to be illegal. The factor himself says, that the practice is so. It is proved, that the plaintiff himself has acted on this practice, and paid within the two months, and been allowed the discount; and it has been done in other cases too. It is also clear, that the factor is in the habit of paying the money to his principal within the two months; and three instances have been proved, in which, when the plaintiff was a seller, he got his money within the two months. There was an instance where the factor, not being satisfied with the responsibility of the buyer, sent to him for, and obtained 1000*l.*, which he paid to the plaintiff. The

(a) 2 B. & A. 137.

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factor has paid more than 1000% to the plaintiff since the 26th of December, which he would not have been able to do without this money of the defendants. I do not say that makes him receive the money for this particular corn; I say, first, that the factor, as far as the buyer knew, was a principal; if he was not a principal, yet, if he acted as a principal, he, by the late act, having been intrusted with goods, may receive payment for them. But, I say further, that he had the right as factor; for, if the note is not controlled by the usage, there is no time for payment mentioned; and, if it is so controlled, then the usage, taken altogether, is in the defendant's favour.

DENMAN, C. J.—The question in this case is, whether in your opinion the plaintiff has been paid for this barley; and that will depend upon whether you are satisfied that there is a custom in the corn market by which the party has a right to pay within the time upon discount; whether any person dealing with a factor there would know, from the prevalence and universality of the custom, that he would have the right of paying within the two months. But, unless that custom is proved to your satisfaction, it is clear there is no answer; as, although the money got into the plaintiff's hands, yet it would not be received as payment for the particular articles. As to the custom, it seems to me, the witness does not speak very distinctly. There may have been some instances every day, and yet the practice may not be universal. Perhaps he may be speaking of an usage where the factor stands *del credere*, which, he says, he did not. If the custom is generally and universally understood, I do not think it matters for whose accommodation the payment is made.—[His Lordship read the evidence of Mr. Gibson, and observed]—The question for you upon this evidence will be, whether you think it has been satisfactorily proved, that when a party authorizes a factor, in the manner in which this plaintiff authorized Mr. Gibson, he gives him also an authority to receive payment

within two months, and to allow a discount. Whether the plaintiff gave Mr. Gibson authority during the two months' credit to accept payment and allow a discount? Whether you think the practice relied on is proved to be a general, I should rather say, an universal custom, on the Corn Exchange? If that is made out to your satisfaction, then the plaintiff will have received payment through Gibson, although Gibson has not paid the money over to him. If you think that the custom is not made out, then the plaintiff will not have been paid, and you will give your verdict for him.

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The jury found their verdict for the defendants, saying, that they thought the custom had been established.

Campbell, S. G., and J. H. Lloyd, for the plaintiff.

Sir J. Scarlett and R. V. Richards, for the defendants.

[Attornies—*Haddon & G., and Barendale & Co.*]

FREEMAN v. BAKER and Another.

Feb. 27th.

THE *first* count of the declaration stated, that before and at the time &c., the defendants were possessed of a certain ship or vessel, called the Leslie Ogilby, which was not copper-fastened, as they well knew; yet the said defendants contriving &c. to deceive and injure the plaintiff in that respect, and to induce him to purchase the said ship or vessel at and for a large sum of money, on the 23rd

A party bought a ship under a representation that she was copper-fastened. He ascertained, in the course of a few days, that she was not, but did not make any complaint to the seller till several months

afterwards, when she had been on a voyage and returned:—*Held*, that this delay would not prevent his recovering in an action for the misrepresentation, provided the action was in other respects maintainable:—*Held*, also, that "Lloyd's Register of Shipping" was not admissible in evidence to shew that the vessel was considered as copper-fastened. The contract stated that the vessel was to be delivered with all her stores, according to the inventory: the inventory was at the end of the advertisement for the sale:—It was *held*, that this did not import into the contract the representation contained in the advertisement, as the vessel itself was not mentioned in the inventory, but only the stores. The questions for the jury, in such a case, are, whether the vessel was in fact copper-fastened; and if it was not, did the seller know that it was not?—and if he did, did he use any means to conceal the fact from the buyer?

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of August, 1831, falsely, fraudulently, and deceitfully represented to him that the said ship or vessel was a copper-fastened ship or vessel: and then averred, that the defendants further contriving &c., then and there kept the said ship or vessel afloat in a certain dock, called the West India Dock, so that it could not be inspected or examined by him, and used and employed divers other subtle arts and devices for the purpose of preventing an inspection and examination by the plaintiff, and thereby afterwards induced the plaintiff to purchase the said ship or vessel as a copper-fastened ship or vessel, with divers stores, for the sum of 1300*l.*, and then and there falsely, fraudulently, and deceitfully sold the said ship or vessel as a copper-fastened ship or vessel, with the stores, to the plaintiff, for the said sum of 1300*l.* then and there paid by the plaintiff to the defendants; by means whereof the said ship or vessel became and still was of little or no use or value to the plaintiff, whereby he was cheated and defrauded by the defendants of the said sum of 1300*l.*

The *second* count was similar, except that it contained no averment that means were used to prevent examination. The *third* count was similar, but it charged a false representation only. The *fourth* count was on a representation that the vessel *shifted without ballast*. It contained a *scienter*, and averred special damage. The *fifth* and *sixth* were similar to the fourth, but without special damage. The *seventh* count was on a *warranty* that the ship was copper-fastened, and particularised iron-fastenings as in fact there. The *eighth* count omitted the part relating to iron-fastenings. The *ninth* count was on a warranty that the ship would shift without ballast, and contained special damage. The *tenth* was similar, but without special damage. Plea—Not Guilty.

It appeared that the vessel was sold under the following advertisement:—"For sale, the fine brig Leslie Ogilby 193 1/2 tons; British built; *coppered and copper-fastened*;

shifts without ballast; takes the ground well; stows a large cargo for her tonnage; was coppered in August, 1829; is well adapted for general purposes, and requires little more than provisions to send her to sea.—Now lying in the West India Docks. The vessel, with all stores, to be taken with all faults as they now lie, without any allowance for weight, length, quantity, or quality.” An inventory of the stores followed this description.

The contract for the sale contained a provision that a legal bill or bills of sale should be made out, and stated that the vessel was to be taken with all her stores according to the inventory.

The bill of sale did not contain either a warranty or a representation.

On the part of the plaintiff, a surveyor from Lloyd's, who examined the vessel in January, 1832, swore that she was not copper-fastened: he described “copper-fastened” as meaning that all the bolts should be of copper which go through the keel and kelson, stern-box, stern-post and stem. He considered the vessel as only partially copper-fastened.

The person for whom the vessel was originally built, and who superintended the sheathing of her with copper, in the year 1825, proved that the description copper-fastened was not a correct description of the vessel in the state to which he brought her at that time. The captain was also called, and stated that the vessel would not shift without ballast; and added, that having a considerable quantity of ballast in her, yet, in a gale of wind beyond Yarmouth, she laid down, and he was obliged to put back and take in several tons more. He admitted that he saw the vessel the day after she was bought, and discovered the iron bolts in her, when he had only got half way down the ladder leading to the hold; and that he told his owners of it in the course of a few days. The broker, who purchased the vessel for the plaintiff, stated, that he

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relied on the representation of the defendants, and did not send any surveyor to examine the vessel at the time of the purchase; but in December, 1831, after she had been to Newcastle, he requested the defendants to send a person to meet the plaintiff's surveyor, for the purpose of examining.

Campbell, S. G., for the plaintiff.—By copper-fastened, I understand that all under water is fastened with copper bolts, and therefore the vessel is tighter, and less likely to be injured by the water. The meaning of shifting without ballast is, that the whole of the cargo may be taken out without any fresh ballast being put in; that is, that the vessel will stand stiff in the water. It is to be said, as I understand, that as the vessel is to be taken with all faults, we cannot complain: but there is a distinction between a fault and a misrepresentation. The party is not liable for a mere fault, but here we complain of a direct misrepresentation. It would be absurd to say that the words "with all faults" would cure a direct misrepresentation. Suppose the warranty was, that the vessel should be all oak, and it turned out to be of Canada timber, it would be a breach of the warranty. The case of *Shepherd v. Kain* (a) is all fours with the present, as here there are a few copper fastenings.

Sir J. Scarlett, for the defendants.—There is a defence both in law and fact. If it is at all material that the ship should be copper-fastened, it can be proved that she was so

(a) 5 B. & Ald. 240. This was an action on the case for the breach of a warranty. The advertisement for the sale of a ship described her as "a copper-fastened vessel;" and added that the vessel was to be taken with all faults,

without any allowance for any defects whatsoever. It appeared that she was only partially copper-fastened. It was held that, notwithstanding the words "with all faults," &c., the vendor was liable for the breach of the warranty.

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fastened after the defendants became possessed of her, though the iron bolts were left in. The plaintiff's witnesses did not try the iron bolts from the inside, to see if they had corroded, and were in consequence moveable. It does not lie in the plaintiff's mouth to say that she was not copper-fastened, for his own card describes her as "A.1. coppered and copper-fastened;" and she has been described in Lloyd's book by the plaintiff as copper-fastened. As to *Shepherd v. Kain*, I do not deny the law of that case; but that was only the first act of the tragedy. There was afterwards an action brought against *Old* by *Kain*, who had bought the vessel of him. It was special *assumpsit*, stating the particular circumstances. In *Shepherd v. Kain* the warranty was in the contract, which is necessary. *Kain v. Old* was argued as a special case, and in it the case of *Pickering v. Dowson* (a) is referred to; which shews that there is no warranty, unless it is imported into the bill of sale; and that the party is not liable, whether he knew the fact or not, if there is no *evidence* of fraud. Lord Chief Justice *Gibbs* there says, "I thought at the trial, and still think, that the parties were not now at liberty to shew any representation made by the seller, unless they could shew that by some fraud the defendants prevented the plaintiffs from discovering a fault which they knew to exist." I do not rely upon the words "with all faults," as, without these, it would be the same. Unless there is a practice not to allow an inspection, a man is not answerable for what is not in the contract, unless he takes pains to conceal the defect. There is no fraud in this case. I re-

(a) 4 Taunt. 779. According to the decision in that case, if a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be after-

wards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the ground that the article sold is not answerable to that representation: and this, whether the vendor knew of the defects or not.

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member a case relating to the Claremont estate, which was sold by the Marquis of Waterford to the present Lord Dover; and after the purchase, it was discovered that a bridge on the estate was out of repair, and an action was brought to try whether the bridge was repairable by the owner of the estate, and it was found that it was; and Lord Chief Justice *Gibbs*, then at the bar, investigated the subject a great deal, and no proceedings were taken on the principle, that, without fraud could be shewn, there was no remedy. As to the shifting without ballast, it did not mean that the vessel would *sail* without ballast, but merely that she would shift from one place to another in the dock without ballast. The statement as to the copper-fastening is neither in the contract signed by the brokers, nor in the bill of sale, nor is the shifting without ballast. I take the law to be clearly and indisputably this: that if a man makes a representation, and allows the purchaser to go and see the article, and he afterwards purchases, there is an end of the representation, unless the seller takes any steps to conceal the defect from the purchaser, for that is fraud.

DENMAN, C. J.—Is not this case exactly like *Pickering v. Dowson*? I cannot distinguish the one from the other.

Campbell, S. G.—Yes, it is; but it is also exactly like *Shepherd v. Kain*, which was decided since.

Maule, for the defendants.—*Kain v. Old* is the latest case, and that recognises *Pickering v. Dowson* (a) as law.

Campbell, S. G.—*Kain v. Old* was decided on the ground that the action was in *assumpsit*.

(a) In the case of *Kain v. Old*, 4 D. & R. 61, Lord Tenterden (then Lord Chief Justice Abbott) said, "These are not new principles, they are all clearly and fully laid down in the judgment of the late Lord Chief Justice, *Gibbs* in the case of *Pickering v. Dowson*. That case appears to us to be quite decisive of the present," &c.

DENMAN, C. J.—I am not so much looking to *Kain v. Old* as an authority, as to *Pickering v. Dowson*; and I really cannot distinguish it from the present case.

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Campbell, S. G.—*Shepherd v. Kain* is untouched by *Kain v. Old*, and that is a later authority than *Pickering v. Dowson*. And in the present case the contract refers to the inventory.

Maule.—The inventory does not commence till after the representation.

DENMAN, C. J.—I observed that, in the opening, the advertisement was called the inventory; but I think it will be better for all parties that the case should go on.

Sir J. Scarlett, to the jury.—The plaintiff should have notified his objection sooner, and not have suffered the vessel to go a voyage before he mentioned it to us.

On the part of the defendants, several witnesses were called: they differed from the plaintiff's witnesses as to the proportion of the iron to the copper-fastenings; but admitted that it could not be said that the vessel was altogether copper-fastened.

It was then proposed to put in a book called Lloyd's Register of Shipping, in which the vessel was said to be described as copper-fastened. The witness who produced it said, that it was made up from information furnished by surveyors (a).

Comyn, for the plaintiff, objected to its reception.

Sir J. Scarlett submitted that it was evidence, as shewing

(a) For a description of this book, see the case of *Kerr v. Shedden*, ante, Vol. 4, p. 531, n. (a).

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that among ship-owners and underwriters it was *considered* as copper-fastened.

DENMAN, C. J.—I think we do not know enough of the mode in which the book is made up to justify its admission in evidence.

A card, issued by the plaintiff in relation to the vessel in question, was put in, which contained the following words: —“ For the Cape of Good Hope, the fine fast sailing ship, Leslie Ogilby; A. 1. coppered, and copper-fastened, &c.”

DENMAN, C. J., in summing up, said—The questions I propose to leave to you are: First, whether the vessel was copper-fastened; and, if she was not, whether the defendants knew it, and were guilty of any fraud in concealing the fact from the plaintiff? The second question will be, whether she shifted without ballast; and, if she did not, were the defendants aware of that also; and did they use any means of concealment? As to the advertisement, I think it has been improperly called the inventory. The words in the contract are, that she is to be delivered, with all her stores, according to the inventory. I do not think that this imports into the contract the description in the advertisement, as the ship is not mentioned in the inventory. A question of law has been raised, which will be considered hereafter; for I think it will be better to have it understood now, that the plaintiff shall be entitled to a verdict. [His Lordship read the evidence, and observed]—Upon this conflicting testimony you are to say, whether, in the understanding of those who are conversant with the subject, the vessel had a sufficient number of copper bolts to make her a copper-fastened vessel. If you think she can be properly called a copper-fastened vessel, then the defendants will be entitled to your verdict, so far as that is concerned. If you think she

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cannot, then, was there any fraud used to conceal the fact from the plaintiff. And upon the question of whether she was copper-fastened or not, I own I think that the plaintiff's card is not to be altogether disregarded. If it had appeared that the plaintiff the next day, with a perfect knowledge of the fact, offered her *for sale* as a copper-fastened vessel, I should have thought it almost a bar to the action, and no doubt it would have been very strong evidence for your consideration. But I confess I do not think that is quite the effect of the card, as the vessel was not unsafe at the time *for passengers*. Yet it makes it a little difficult for the plaintiff to say, she is not, in the popular sense at least, a copper-fastened vessel, when, a year after she was bought, he described her as such. His Lordship then read the evidence to the jury, on the point of shifting without ballast, and left the question of damages entirely to their consideration.

The foreman of the jury inquired whether it would make any difference as to the verdict, if the jury should think that the ship was not copper-fastened, but that the plaintiff ought to have made his objection sooner.

DENMAN, C. J.—I do not think that it will make any difference; it would have been much better if notice had been immediately given. But, I think, that the plaintiff was not bound to give it. I think a man may complete the contract, and then recover from the seller any difference in the value, if he has been deceived. I think so for this reason, viz. that a man may want a vessel for his immediate purposes, and it may be inconvenient to him to give it up at the time.

The jury were of opinion that the vessel did shift without ballast, and was not copper-fastened; but that there was no evidence that the defendants were aware of the

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fact, and consequently they did not use any means to conceal it. They found a—

Verdict for the plaintiff—Damages 120*l.* (a).

Campbell, S. G., and *Comyn*, for the plaintiff.

Sir *J. Scarlett*, *Maule*, and *Tomlinson*, for the defendants.

[Attornies—*Collins*, and *Gale*.]

(a) The legal effect of this verdict will be considered by the Court on the discussion of a rule which has been obtained, to shew cause why a nonsuit should not be entered.—See, in addition to the

cases cited, *Baglehole v. Walters*, 3 Camp. 155; *Dobell v. Stevens*, 3 B. & C. 623; *Budd v. Fairman*, ante, p. 78; and *Paley's Law of Principal and Agent*, pp. 161 to 165.

COURT OF COMMON PLEAS.

Adjourned Sittings at Westminster, after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE TINDAL.



HEAD v. BRISCOE, Bart., and Wife.

Feb. 11th.

A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, though they may be permanently living apart; at least, if it be not shewn that the wife at the time was living in adultery.

ACTION for a libel published by the female defendant, Dame Sarah Briscoe. Plea—that she was not guilty.

It appeared that the plaintiff, who was a house agent, had let a house to a Mrs. Toleson, with whom the female defendant lived for some time, when, they having quarrelled and separated, the female defendant caused a placard to be printed and stuck about in the street, which commenced as follows:—"Felony. Ten guineas reward. Whereas Mary Toleson, of &c., late of &c., was left in charge of a house, &c." It then went on to charge Mrs. Toleson with having

stolen some furniture belonging to the female defendant, and added these words—"It is supposed that Mary Tolson was assisted by George Head, house agent, of No. 7, Upper Baker Street, New Road, in conveying the same to his house for the purpose of secreting it." Information was requested, at the bottom of the bill, to be given to Messrs. Pasmore & Taylor, Basinghall Street.

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Wilde, Serjt., for the plaintiff.—A person suspecting a felony may reasonably do what is necessary to apprehend the felon, but this mention of the plaintiff could not be necessary. I admit that Sir W. Briscoe had nothing to do with the libel, and only require such damages as may relieve the character of the plaintiff from any suspicion. The defendant, Sir W. Briscoe, is living separate from his wife; yet he is answerable for her acts, until he obtains a dissolution of the marriage. And if he has been correct in his own conduct, and his wife has not, he may relieve himself from any liability by application to the proper Courts.

Adams, Serjt., for the defendant Sir W. Briscoe.—This is a case of first impression. I have searched all the law books from the earliest time, and cannot find the principle even agitated. The defendant, Sir W. Briscoe, cannot be acquainted with the circumstances of the case. The ground of damages in an action of libel, when no special damage is averred, is the existence of malice; and then in this case there is no malice on the part of my client. But if he is by law to be charged, the most temperate damages should be given. The plaintiff should have indicted the female defendant instead of bringing an action for damages against her husband.

TINDAL, C. J.—There is no doubt, in point of law, that a husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done

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by the wife. And whether their separation be permanent or temporary it does not affect the question, unless it operates so upon the marriage as to make that civil relation cease; for, by the law of England, you cannot bring an action against the wife without joining the husband; and a man would be without remedy if he could not sue the husband. Upon this ground I have no doubt, as at present advised, that the action is maintainable. If I am wrong in my opinion the learned counsel for the defendant will have an opportunity of moving the Court.

His Lordship left the question of damages to the jury, who found a verdict for the plaintiff—

Damages 40s.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Adams and *Bompas*, Serjts., for the defendant Sir W. Briscoe.

[Attornies—*Carlton*, and *Springhall & H.*]

IN the ensuing term, *Adams*, Serjt., moved pursuant to the leave given; but the Court, after observing that there was no evidence that the wife was living in adultery (a)—

Refused a rule.

(a) See, upon this point, the case of *Rex v. Flintan*, 1 B. & Ad. 227, which decides, that a man is not liable to the penalty of the stat. 5 Geo. 4, c. 83, s. 3, for neg-

lecting and refusing to maintain his wife, who has left him, and committed adultery, although he himself has been guilty of adultery since her departure.

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WALKER v. RAWSON.

Payment of money into Court in *assumpsit* on the common

counts for work and labour, is an admission that the contract was with the party suing, where it appears that there was in fact only one contract.

ASSUMPSIT for work and labour as an engineer, against the defendant, as chairman of the Directors of the

Leeds and Manchester Railway Company. A sum of money had been paid into Court.

It appeared in the course of the cause that a bill had been delivered in the names of Walker & Burgess, and it appeared that those gentlemen were in partnership as engineers, but Mr. Walker had received the communication from the parties on the business.

On the part of the plaintiff, the payment of money into Court was relied on as an admission that the contract was with Mr. Walker, the plaintiff.

Jones, Serjt., for the defendant, contended, that payment of money into Court was no admission on the common counts of anything more than that such sum was due. He referred to the case reported under the name of *Seaton v. Benedict (a)*.

TINDAL, C. J.—The only question here is, with whom was the contract made? I think the payment of money into Court gets rid of the difficulty. There can be but one contract. It is not like the case of the goods furnished for the wife, which has been referred to; for in that case there might have been authority for one part and not for another.

Wilde and *Talfourd*, Serjts., and *Hoggins*, for the plaintiff.

Jones, Serjt., and *Baines*, for the defendant.

[Attornies—*Chisholme & Co.*, and *Walmsley*.]

(a) 2 Moore & Payne, 66, the decision in that case was, that payment of money into Court in *assumpsit* for goods sold and delivered, only amounts to an admission by the defendant of the plaintiff's right of action to the

amount of the sum paid in, and applies only to a legal demand, and not to *all the items* contained in a bill of particulars, in which the goods are stated to have been supplied at different times.

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*Adjourned Sittings in London after Hilary Term,
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BEFORE LORD CHIEF JUSTICE TINDAL.

Feb. 20th.

PHIPPS v. TANNER.

A bill of exchange for *twenty-five, seventeen shillings and three-pence*, is a bill of exchange for twenty-five pounds, seventeen shillings and three-pence, and may be declared on as such.

ASSUMPSIT by the plaintiff, as drawer, against the defendant, as acceptor of the following bill of exchange:—

“ 25 : 17 : 3.

“ London, 6th March, 1832.

“ Three weeks after date pay to me or my order *twenty-five, seventeen shillings and threepence*, value received.

“ Robert Phipps.

“ To Mr. Alfred Tanner,

“ 4, Brabant Court, Philpot Lane.”

This bill was declared on as a bill for 25*l.* 17*s.* 3*d.*

Jones, Serjt., objected, that this was not a bill for twenty-five *pounds*, seventeen shillings and three-pence.

TINDAL, C. J.—It must mean pounds, and cannot mean anything else.

The defence was usury, and the case was left to the jury on that defence.

Verdict for the defendant.

Addison, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*Aston*, and *Tanner*.]

In the case of *Rex v. Post*, Bay. on Bills, 8 (*n.*), a prisoner had altered a note for one pound into a note for ten, by substituting ten for one before the word “pound” in the body of the note, and also in the corner. It was urged, that a note for the payment of ten

pound was not a money note; but the twelve Judges were clear that it was. So, in a case mentioned as cited by Lord *Mansfield* and also by Lord *Hardwicke*, (Id. 6), where a note contained the words “I promise *not* to pay,” the word *not* was rejected.

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CURTIS v. MILLS.

CASE. The *first* count of the declaration stated, that the defendant wrongfully kept a dog, well knowing it to be accustomed to bite mankind, and that the plaintiff was bitten by it. The *second* count charged, that the dog was of a ferocious and mischievous nature, as the defendant well knew; and that it bit the plaintiff. The *third* count stated, that the dog was of a ferocious and savage nature, as the defendant well knew, and that it was his duty to secure it; but that, not regarding his duty, he did not sufficiently secure it, by means of which the plaintiff was bitten (a). Plea—General issue.

In an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's

own carelessness and want of caution.

(a) As the form of this count is not contained in the books of precedents, we think a copy of it may be useful; it was as follows—
“And whereas also, the said defendant, on the day and year aforesaid, at London aforesaid, and from thence for a long space of time, to wit, until and at the time of the damage and injury to the plaintiff as hereinafter next mentioned, to wit, at London aforesaid, was possessed of, and wrongfully and injuriously kept a certain dog, which then was of a ferocious and savage disposition, and which the said defendant then and there well knew, and thereupon it then and there became and was the duty of the said defendant to take due and proper means to confine and secure the said dog in a careful, sufficient, and proper manner; yet the said defendant, not regarding his duty in that behalf, kept and secured the said dog in so careless, insufficient, and im-

proper a manner, that afterwards, to wit, on the day and year aforesaid, at London aforesaid, by and through the carelessness, negligence, and improper conduct of the said defendant in that behalf, the said dog did attack, seize, lay hold of, and bite the said plaintiff, and did then and there greatly lacerate, hurt, and wound the said plaintiff in divers parts of his body, and thereby the said plaintiff then and there became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff thereby suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted; and also, by means of the premises, the said plaintiff was thereby then and there put to

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It appeared, that the defendant kept a very fierce dog chained in his yard; but, that any one going from the yard gates to the stable would be within the reach of the dog, notwithstanding his chain. It further appeared, that the defendant had bought some planks of Messrs. Goodman, and that he himself carried one of the planks down his yard, the plaintiff, who was in the service of Messrs. Goodman, following him, and carrying the other: the defendant passed by the dog, and as the plaintiff, who followed him, was passing it also, the dog made a spring at him, and bit him very severely. On the part of the defendant it was proved, that the yard had been twice robbed before this time, and that the plaintiff had been several times cautioned on former occasions not to go within the reach of the dog; but no caution was given on the day on which the accident occurred; there was no evidence that the dog had ever bitten any person on any other occasion.

Spankie, Serjt., for the defendant.—The question is, whether this dog was kept by the defendant improperly. The plaintiff had notice that the dog was there, and was a sharp dog; and he was indiscreet in going near him; he need not have passed the dog, and he had been repeatedly cautioned not to go within his reach. The premises had been robbed, and the dog was known as a fierce dog; indeed, I should say, that the reputation of the dog is the security of the premises. If a man keeps a dog to protect his property, it is not surprising that he keeps a sharp dog. Of course he would not keep a poor spiritless fawn-

great expense, costs, and charges, in the whole amounting to a large sum of money, to wit, the sum of ten pounds, in and about endeavouring to be cured of the said wounds, sickness, lameness, and disorder, so occasioned as afore-

said, and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at London aforesaid, to the damage of the said plaintiff of five hundred pounds; and, therefore, he brings his suit, &c."

ing beast, as such an animal would be of no manner of use; and if a man is not allowed to keep a sharp dog, he cannot keep his property secure from depredations.

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Wilde, Serjt., in reply.—A party has no right to keep a dog of this sort, so as to command the way to his stable. It was the bounden duty of the defendant to have given the plaintiff an express caution on this occasion.

TINDAL, C. J. (in summing up).—The first question is, whether this dog was of a savage disposition to the knowledge of the defendant; and, if so, you will then have to consider whether the dog was placed in such a situation, that, by common care, he might have been avoided. Another question will be, whether the plaintiff was bound to take notice of the danger, as he had been told that the dog was there. If you think, that, by reason of the plaintiff's not taking common care, this accident occurred, he cannot recover; however, you may be of opinion, that, the master of the dog walking just before the plaintiff, and, as it were, leading him on, the plaintiff might think he was safe, more especially as no caution was given him at this time by the defendant. I am of opinion, that the plaintiff is entitled to recover, if he did not as it were run himself into the mischief by his own carelessness and want of caution.

Verdict for the plaintiff—Damages 20*l*.

Wilde, Serjt., and *Shee*, for the plaintiff.

Spankie, Serjt., and *Carrington*, for the defendant.

[Attornies—*Ripplingham*, and *W. P. Clarke*.]

See the cases of *M'Kone v. Wood*, *ante*, p. 1; *Blackman v. Simmons*, *ante*, Vol. 3, p. 138; and *Sarch v. Blackburn*, *ante*, Vol. 4, p. 297. In the case of *Jones v. Perry*, 2 Esp. 482, Lord Kenyon held, that an action would lie for damage occasioned by the keeping of a dog known to be fierce not properly secured. In the case of *Brock v. Copeland*, 1 Esp. 202, it was held, that if a dog, accus-

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tomed to bite mankind, was kept on the defendant's premises, and the injury received in consequence of the plaintiff imprudently going there, an action would not lie; but Lord *Kenyon* said, that, where an accident arose from a mischievous bull, and it appeared that there was a contest respecting a right of way through the field in which it occurred, he had held that the defendant was liable. In actions of this kind, the defendant's knowledge of the animal's being vicious is essential. In the case of *Mason v. Keeling*, 12 Mod. 332, the de-

claration stated, that the defendant kept a dog, which was very fierce, and suffered it to go unmuzzled about the streets, so that, by the want of care of the defendant, the plaintiff, while walking in the street, was bitten. This declaration was held bad, because it did not state a *scienter*. The following cases also decide the *scienter* to be material: Dy. 25 b; *Bayntun v. Sharp*, Lut. 33, 2 Salk. 662; *Jenkins v. Turner*, 2 Salk. 662, Lord Ray. 109; *Smith v. Pellah*, 2 Str. 1264.

COURT OF EXCHEQUER.

Adjourned Sittings at Westminster, after Hilary Term, 1833.

BEFORE MR. BARON GURNEY.

(*Who sat for the Lord Chief Baron.*)

SARJEANT v. COWAN and Another.

A sheriff had obtained judgment against A. in an action on a bail bond. On this a *fi. fa.* issued, directed to the coroner. S., who was attorney for the sheriff, and also for others, indorsed the name of a sheriff's officer on the writ; the coroner's broker seized a barge, which was bought by B., and the price paid to the officer; subsequently, the barge was claimed by others, and B. lost his purchase:—*Held*, that, under these circumstances, the officer was not the agent of the sheriff, so as to make the sheriff liable in an action for money had and received at the suit of B., although it was proved to be the practice at the sheriff's office, to indorse the name of the officer on the writ.

ASSUMPSIT for money had and received. Plea—the general issue.

It appeared that the defendants, who were Sheriff of Middlesex, had been plaintiffs in an action on a bail bond, against a person named Wigeon, and obtained a verdict

and judgment, in consequence of which a writ was issued, directed to the Coroner of Middlesex, by which a barge, alleged to be the property of Widgeon, was seized and sold by the coroner's broker. The writ had the names of Simpson and Burder indorsed on it, who were at the time officers of the Sheriff of Middlesex, which names were indorsed by Smith, Son, & Merriman, who were attornies for the sheriff as well as others. Simpson was called as a witness for the plaintiff, and proved that he did not execute the writ, but had received the money from the broker, and retained it in his possession, and did not pay it over to the defendants, for a reason which he stated. The action was brought to recover back the money paid by the plaintiff for the barge, on the ground that the consideration had failed, as other persons had claimed the barge as theirs, and deprived the plaintiff of the profit of his purchase.

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GURNEY, B., inquired of the plaintiff's counsel how he fixed the defendants with the possession of the money.

J. Williams.—I rely on the fact, that the money was received by a person, who was at the time an officer of the sheriff, and whose name was on the writ, and who must therefore be taken to be the agent of the defendants.

GURNEY, B.—An officer of the sheriff is not a general agent of the sheriff to receive money. He is the particular agent of the sheriff appointed in each particular case. Here the legal authority to sell was given by the coroner. You do not shew that these defendants gave any authority in the matter.

J. Williams.—For this reason I wish to inquire into the course of business in the sheriff's office.

Simpson was allowed to be recalled, and said, that he had been an officer of the sheriff for twenty years, and

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that the practice was, when the sheriff gave a warrant to his officer, to put the name of the officer at the tail of the writ.

J. Williams.—I submit, that inasmuch as it appears that the writ was not indorsed in the coroner's office, but in the office of the sheriff's attornies, and as the person whose name was on it was an officer of the sheriff at the time when he received the money, he must be taken to have received it on behalf of the sheriff, as the practice of the sheriff's office was to indorse the writ with the name of the officer. And the reason he gave for not having paid over the money to the sheriff was matter of arrangement between the defendants and him, and would not prevent the plaintiff from suing the sheriff.

W. H. Watson, on the same side.—The action is not against the defendants *qua* sheriff, but as persons suing out the writ directed to the coroner.

GURNEY, B.—I think that mode of stating the argument is most correct, which assumes that the defendants are not charged as sheriff, but as plaintiffs in the former action. Yet I think that the plaintiff has not fixed them with the possession of the money, and therefore he must be nonsuited.

Nonsuit.

J. Williams and *W. H. Watson*, for the plaintiff.

Holt, for the defendant.

[Attornies—*West & Morris*, and *Smith & Co.*]

In the ensuing term, *J. Williams* moved to set aside the nonsuit; but the Court—

Refused a rule.

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Feb. 6th.

NICHOLSON *v.* HARDWICK, Esq. and Another.

ASSAULT and false imprisonment. Plea—Not guilty (a).

The plaintiff sued *in forma pauperis*. It appeared that the plaintiff's wife died, after an illness of only a few hours, on the morning of the 12th June; and in the course of that day a great sensation was excited in the neighbourhood in which the plaintiff lived; and rumours were in general circulation, that he had poisoned his wife. A great crowd was collected about six o'clock in the evening; and, in consequence of the rumours, the defendant Brooman, who, it was proved, acted as constable of the parish, without any warrant, took the plaintiff into custody, and conveyed him before the other defendant, Mr. Hardwick, who was a police magistrate. The plaintiff was detained in custody till the next day. He was not put into any cell, but allowed to sit by the fire at the police station; and, as soon as the medical men who opened the body had reported that the woman died from natural causes, he was immediately discharged. It appeared afterwards, and was proved at the trial, that the woman was taken very ill in the street, about half-past eleven in the evening of the 11th June, and was carried by a patrol to Bishopsgate watch-house, and conveyed home in a cabriolet. The patrol, who proved this, said that the husband assisted him in taking her up stairs, and that she spoke of her husband in the highest terms.

A woman died after a very short illness. Rumours were generally in circulation in the neighbourhood where she had lived, that her husband had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody and conveyed him before a magistrate, who detained him till medical men had reported the cause of death, and then discharged him:—*Held*, that if the jury were of opinion that the constable had reasonable ground of suspicion to justify the apprehension, the action could not be maintained. The jury thought that there was such ground, and found a verdict for the defendants.

GURNEY, B., to the plaintiff's counsel.—If this is to repel any suspicion of your client's having poisoned his wife, there is no necessity for it, for that is not suggested now. The question is, what was the notion at the time? What is known now was not known then.

(a) *Vide* stat. 21 Jac. 1, c. 12, Notice of action was proved pursuant to 24 Geo. 2, c. 44, ss. 2 & 3.
s. 5, referred to *ante*, Vol. 1, p. 41.

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A witness who was called for the plaintiff proved, on his cross-examination, that he had seen the wife only the day before, in excellent health and spirits; and, hearing of her death, spoke to the plaintiff about it, but could scarcely get any answer from him. He added, that the plaintiff did not seem at all affected by the loss of his wife; and that, in consequence of the unsatisfactory nature of the plaintiff's answers, he himself went to the police office and stated his suspicions. But it did not appear whether or no the constable was aware of his having done so.

Platt for the defendants submitted, that there was no case on the part of the plaintiff, because the defendant Broman was a constable; and it was his duty, under such circumstances, to take the plaintiff into custody.

GURNEY, B., in summing up, said—The case of *Beckwith v. Philby* (a), which was cited before me the other day, is precisely in point. There, some horses had been stolen, and the plaintiff was suspected of having stolen them; and a constable was told of it and desired to take him before a magistrate, which he did. The plaintiff brought his action for false imprisonment. Mr. Justice *Littledale*, tried the case at the Spring Assizes—He did not nonsuit, but told the jury, that provided the constable had reasonable cause for suspecting that the plaintiff had committed a felony, he was justified in what he did, and their verdict must be for him. But his Lordship gave leave for a motion on the part of the plaintiff. This motion was made, and Lord *Tenterden* afterwards gave the judgment of the Court, and said—“There is no ground, in my opinion, for disturbing this verdict; the only question of law in the case is, whether a constable, having a suspicion, may arrest a person without a warrant; we are of opinion

(a) This case is reported in 6 B. & C. 36, 9 D. & R. 487.

that he may. There is this distinction between a private individual and a constable. To justify a private individual, he must not only prove that there was reasonable suspicion against the party, but that a felony had been actually committed; whereas a constable, having reasonable ground of suspicion, may arrest upon that only." Such being the law, as laid down in that case, the question in the present case will be, whether the [constable Brooman had reasonable ground of suspicion to justify his taking the plaintiff into custody. The fact of the wife's being taken ill in the street was not known at that time. One person actually made inquiry of the plaintiff, and, not being satisfied with his answer, went to the police-office and stated his suspicions. It seems that at six o'clock there was a great crowd in front of the plaintiff's house, and the constable went and took him away. And I confess I think that the act of the constable was an act of kindness; because a person suspected of murder is not in the safest state in the world from a mob who are making the charge against him. Now, what are the facts of this case? Here is a very sudden death, and a wide spread rumour; and the man is allowed to sit by the fire at the police station. If you think there was reasonable ground of suspicion to justify what was done, then you will find your verdict for the defendants.

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Verdict for the defendants.

C. Jones and Mansel, for the plaintiff.

Platt and Bodkin, for the defendants.

[Attornies—*Abrahams*, and *Henderson & Smith*.]

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*Adjourned Sittings in London after Hilary Term,
1833.*

BEFORE LORD LYNDHURST, C. B..

HICKS v. MARECO.

Feb. 15th.

Interest cannot be recovered on money had and received, or money paid, without a special agreement; but, if money was at first had and received, and there is a subsequent agreement to pay interest, the plaintiff may recover such money and interest on a count for money had and received, and on a count for interest, and need not declare specially.

ASSUMPSIT.—The *first* count of the declaration stated, that the plaintiff had advanced money to the defendant at his request, the defendant undertaking to invest it in the funds, which he had not done. There was also a count for money had and received, and a count for interest. There being no dispute about the amount—

R. V. Richards appeared to consent to a verdict for 2000*l.*, and interest, but suggested that it must be entered on the special count.

The plaintiff's counsel wished to enter the verdict on the count for money had and received, and on the count for interest.

LORD LYNDHURST, C. B.—You cannot recover interest on money had and received, or money paid, without a special agreement.

J. Williams, for the plaintiff.—The money was first had and received; and there was a subsequent agreement to pay interest.

R. V. Richards.—That special agreement ought to have been declared upon.

LORD LYNDHURST, C. B.—I think the verdict may be taken on the count for money had and received, and on the count for interest.

Verdict accordingly (*a*).

(*a*) We have reason to believe, that the plaintiff's object in wishing to have the verdict entered on these two common counts was,

J. Williams and *M' Mahon*, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*Woodhouse*, and *Holt & G.*]

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that he feared, that, if a verdict was taken on the special count only, there might be an application to discharge the bail.

REID v. FURNIVAL.

ASSUMPSIT on a bill of exchange drawn by a person named Retemeyer on and accepted by the defendant, for 300*l.*, dated 24th December, 1830, and payable three months after date to the order of the drawer. The bill had been indorsed by the drawer, and also by persons named Mackenzie and Macgregor.

For the defence, a letter written by the plaintiff to the defendant's attorney, containing the following passages, was put in:—

“ All I knew about the matter was, that Mr. Furnival's bill for 300*l.* was sent to me by a particular friend in London, requesting that I might get it discounted; which, as I happened to know some of the parties whose names were attached to the bill, I complied with, from a wish to accommodate my friend. It was accordingly handed over to the British Linen Company's Bank here, by whom it was discounted at my request; but, as the whole amount of the bill was not at the time required, the sum of 100*l.* only has as yet been advanced upon it and remitted to my friend, 200*l.* being withheld in consequence of the bill having been dishonoured.”

“ The only satisfactory reply which I received on the subject was, that Mr. Furnival, the acceptor, was a responsible person; consequently, for my own better security, I had determined in the first instance to institute legal proceedings against him, as I had no advantage directly or indirectly from the transaction, but, on the contrary, I am

Feb. 15th.

A. procured a banking company to advance 100*l.* on a bill of exchange for 300*l.*, A. giving the company his guarantie for the amount so advanced, but having no other interest in the bill:—*Held*, that A. might recover the whole amount of the bill in an action against the acceptor, and not merely the amount for which he gave his guarantie.

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held answerable to the bank for the amount advanced on it on my guarantie."

"In the full hope, however, that the explanation I have now given will at once induce you or your client to reimburse me, at least in the amount already advanced on the bill, viz. 100*l.*, and 2*l.* 1*s.* 11*d.*, already incurred for expenses and interest, from 27th of June to 4th September next," &c.

Carrington, for the defendant, submitted, first, that the plaintiff had no right of action, as he had not discounted the bill, but had merely carried it to the British Linen Company as the agent of others; and that, even if it could be considered that, from his having given a guarantie, he had an interest in the bill, still it would only entitle him to a verdict to the amount of his guarantie.

Lord LYNDHURST, C. B.—The plaintiff has a right to sue on this bill, because he is liable on the guarantie for the amount that has been advanced on it; and, if he has a right to sue, he may recover the whole amount: but he will be only a trustee for all above the amount of his own claim, and he must pay the residue to the person from whom he received the bill.

Verdict for the plaintiff—Damages 313*l.*

R. V. Richards, for the plaintiff.

Carrington, for the defendant.

[Attornies—*Hutchinson*, and *Pyne*.]

IN the ensuing term, *Carrington* moved for a new trial, or to reduce the damages; but the Court refused a rule, Mr. Baron *Bayley* observing, that there was a case in *Wilson's Reports* (a), which bore on this point.

(a) In the case of *Johnson v. Kennion*, 2 Wils. 262, which was an action by the indorsee against the drawer of a bill of exchange

for 1000*l.* It appeared that an indorser, named Benson, had paid the plaintiff 232*l.*, part of the money. The verdict was for the whole amount; and, on a rule for a new trial being argued, *Prutt, C. J.* (afterwards Lord *Camden*) said, "Though there are many indorsements on the bill, yet there is but one security for one sum of money, and he who has the possession of the bill may bring the action. Where there are many indorsers the indorsee has a right of action in succession; but there is but one right of action against one person at one and the same time. The bill being in one indorsee's hand, the indorser pays a part, and the objection is, that this ought to be considered a payment for the drawer; but I think, *toto calo*, it is otherwise, because the indorser is no servant, nor is agent to the

drawer. Suppose Benson had paid the whole 1000*l.* to the plaintiff, and Benson's name had not been struck out, and an action had been brought in the plaintiff's name against the drawer, will you say the action will not lie. The bill is a security for every indorser as *cestui que trust*. I think it is a plain case that the plaintiff has a right to recover the whole money, and when he receives it, he will have received 232*l.* of Benson's money. The defendant has no reason to complain." Mr. Justice *Bathurst* said, "You cannot split the bill so as to subject the party to different actions." And Mr. Justice *Gould* says, "where the drawer of the bill has paid part, you may indorse it over for the residue, otherwise not, because it would subject him to variety of actions."

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THOMPSON v. MOSELY.

Feb. 16th.

ASSUMPSIT by the indorsee against the acceptor of the following bill of exchange:—

" £75.

" Three months after date pay to my order the sum of seventy-five pounds, value received.

" James Thorn.

" Mr. William Mosely,
" 2, King's Road, Bedford Row."

A person's having a lien upon a document is no objection to his producing it on a trial at *Nisi Prius*; but if he fears that it may be abstracted, the Judge will allow him to stand by the witness while the witness is examined respecting it.

In an action on a bill of exchange, where the defence is, that the bill had been altered, the defendant cannot go into evidence to shew that other bills have been likewise altered.

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It was alleged, on the part of the defendant, that the bill had been originally for 55*l.*; and that it had been altered by the taking out of the word fifty and the figure 5 by chloride of soda, with the use of which it was proved that the drawer, who was a surgeon, was acquainted.

On the part of the defendant, Mr. Lewis was called to produce another bill. Mr. Lewis objected to producing that bill, because he claimed a lien on it.

R. Alexander, for the defendant.—Mr. Lewis's having a lien on the bill is no objection to the production of it.

Lord LYNDHURST, C. B.—I think that it is no objection. They only want you, Mr. Lewis, to shew the bill, and you can stand by the witness while he looks at it, if you fear that the bill may be abstracted.

Mr. Lewis did so.

R. Alexander proposed to ask one of the witnesses for the defence as to ten other bills of exchange which were alleged to have been altered.

Lord LYNDHURST, C. B.—I think that I cannot receive the evidence. Has not the point been decided?

R. Alexander.—Yes, my Lord, at *Nisi Prius* (a).

Lord LYNDHURST, C. B.—I cannot receive the evidence; it is trying other issues, which the opposite party are not prepared to meet.

Evidence rejected.

Verdict for the plaintiff.

(a) In the case of *Balsetti v. Serani*, Pea. N. P. C. 192, by Mr. Justice Buller; and in the case of *Viney v. Barss*, 1 Esp. 293, by

Lord Kenyon: in the latter case Lord Kenyon mentions that the point had also been ruled by Lord Mansfield.

Follett and Helps, for the plaintiff.

R. Alexander and Cowling, for the defendant.

[Attornies—*Bodman*, and *Johnson & Weatherly*.]

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PEARCY v. FLEMING.

Feb. 16th.

ASSUMPSIT on an agreement relating to the sale of a public-house.

On the part of the defendant, one of the bail was called. He was objected to, and the bail-piece being in Court, it appeared that he was bail to the amount of 100*l*.

Law, for the defendant, proposed to deposit 200*l*. with Mr. Walton, the marshal of the Lord Chief Baron, and that the name of the witness should be struck out of the bail-piece; he cited the case of *Bailey v. Hole* (a).

One of the bail was called as a witness for the defendant, and objected to; but, on a sum equal to double the amount sworn to being deposited with the marshal of the L. C. B., his Lordship struck the witness's name out of the bail-piece, and he was examined.

Lord LYNDEHURST, C. B.—I think you may do that.

Two bank notes of 100*l*. each being handed to Mr. Walton, and his Lordship having struck the name of the witness out of the bail-piece, he was examined.

Nonsuit, with leave to move to enter a verdict for the plaintiff.

Talfourd, Serjt., and *Godson*, for the plaintiff.

Law and *Thesiger*, for the defendant.

[Attornies—*Scargill*, and *Young & W.*]

In the ensuing term, *Godson* applied to set aside the nonsuit; but the reception of the witness's evidence was not objected to.

(a) *Ante*, Vol. 3, p. 560.

OLD BAILEY APRIL SESSION,

1833.

BEFORE LORD CHIEF JUSTICE DENMAN, AND MR. BARON
VAUGHAN.

1833.

April 12th.

REX v. CHARLES SHADBOLT.

If a person, for the purpose of accomplishing a robbery, wound, by means of kicking, the skin of the party whom he is endeavouring to rob, he is punishable, under the stat. 9 Geo. 4, c. 31, s. 12, if the jury find that his intent was either to disable or to do grievous bodily harm.

THE prisoner was indicted for that he, on the 8th of April, at the parish of St. Luke, in and upon one John Masters, wilfully, maliciously, and unlawfully did make an assault, and feloniously, unlawfully, and maliciously did strike and wound him in and upon his head and face, with intent, feloniously, wilfully, maliciously, and unlawfully to obstruct, resist, and *prevent* his lawful *apprehension* and detention, *for feloniously assaulting* the said John Masters, *with intent to rob* him, for which he was liable by law to be apprehended, imprisoned, and detained.

The *second* count stated the prisoner's intent to be to *disable* John Masters. The *third* count stated the intent to be to do him some grievous bodily harm.

The prosecutor stated, that about one o'clock in the morning of the 8th of April, he was in Mitchell Street, Saint Luke's, when the prisoner, whom he did not know before, came up, and, without speaking, walked with him for some distance; that he (the prosecutor) then said to him, "I am close at home:" soon after which, the prisoner put out his foot and threw him down, and tried to take his watch by pulling at the chain; that he put down his hand to prevent him, and the prisoner kicked him in the mouth

several times with violence; that he bled very much from the mouth and nose; that the skin of his face was cut near the lips, and also broken a little near the eye. When the prisoner was taken, his hands were covered with blood, and blood was upon one of his shoes, to which also two small pieces of flesh and skin adhered. The prosecutor was a cripple.

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DENMAN, C. J. (VAUGHAN, B. being present), left it to the jury to say whether the prisoner's intent was either to disable the prosecutor, or to do him some grievous bodily harm by the violence which he used. Nothing was more likely to accomplish the robbery which he had in view than the disabling which such violence would produce. The intent in the first count could hardly be said to be proved, as no endeavour to apprehend was made at the time.

The jury found the prisoner guilty on the last two counts.

See the 1st Vol. of Russell on Crimes and Misdemeanors, p. 599, where he refers to the case of *Rex v. Gillow*, Ry. & Moo. C. C. R. 85, and says, "Although the intent laid be that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was to prevent his lawful apprehension, yet he may be convicted, if, in order to effect the latter intent, he also intended to do grievous bodily harm. The prisoner was engaged in poaching, and had fired his gun at one of three keepers, who, being on the watch for poachers, suddenly sprung up, and were rushing forwards to seize him. The Jury were of opinion, that the prisoner's motive was to prevent his lawful apprehension; but that, in

order to effect that purpose, he had also the intention of doing the keeper some grievous bodily harm. Upon objection taken, the learned Judge was of opinion, that if both intents existed, the question which was the principal and which was the subordinate intention was immaterial; and upon the point being submitted to the consideration of the Judges, it was holden, that, if both the intents existed, it was immaterial which was the principal and which the subordinate one; and that the conviction was therefore proper."

In the case of *Rex v. Hunt*, Ry. & M. C. C. R. 93, a point was made on behalf of the prisoner that no grievous bodily harm was done, as the cut was upon the wrist, and did not appear to have

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been dangerous, as it got well in about a week; and the prisoner's counsel relied upon a doubt expressed by Mr. Justice *Bayley*, in *Rex v. Akenhead*, Holt, N. P. C. 470, whether the injury done was a grievous bodily harm contemplated by the act, if the wound was not in a vital part. Upon the case being submitted to the Judges, they were of opinion, that, if there was an intent to do grievous bodily harm, it was immaterial whe-

ther grievous bodily harm was done. In the case of *Rex v. Thomas Davis*, ante, Vol. 1, p. 306, it was decided, by Mr. Baron *Garrow*, that if a person shoot at another who was endeavouring to apprehend him, he might be convicted on the usual indictment for shooting with intent to murder; though shooting with intent to prevent apprehension was then a distinct capital offence under Lord *Ellenborough's* act.

NORFOLK SPRING CIRCUIT,
1832.

CAMBRIDGE ASSIZES.

BEFORE MR. BARON GURNEY.

REX v. JOSEPH THRING.

1832.

March 13th.

THE prisoner was indicted for perjury, committed in a case tried at the Cambridge Borough Sessions.

A book, containing minutes of the former trial, was produced by the officer of the sessions, as evidence of what had occurred.

GURNEY, B. inquired if the record was made up on parchment? and was answered in the negative by the counsel for the prosecution, who added, that it was not considered necessary.

GURNEY, B.—The Minute Book of a Court of Quarter Session is not evidence. The record should be made up on parchment, and then an examined copy of it would be evidence.

The book was not received in evidence, and the prisoner was—

Acquitted.

Hunt, for the prosecution.

The Minute Book of a Court of Quarter Session is not evidence of its proceedings. The record should be made up on parchment, and an examined copy produced by a witness who examined it.

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BURY ASSIZES.

BEFORE MR. BARON VAUGHAN..

March 17th.

REX v. CRICK.

"A certain cover, in the parish of A.," is too general a description to sustain an indictment for poaching under the stat. 9 Geo. 4, c. 69.

THE prisoner was indicted for poaching in "*a certain cover*, in the parish of —." The parish was mentioned.

On the part of the prisoner, it was submitted that the description was too general.

And of this opinion was the learned Judge; and the prisoner was—

Acquitted.

Prendergast, for the prisoner.

The words of the stat. 9 Geo. 4, c. 69, s. 9, are, "any land, whether open or inclosed." The better way would be, perhaps, to have one count, describing the land by name, if it has any; and another, stating the name of the occupier.

March 19th.

REX v. FALLOWS and SAXTON.

A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. B. threw down the bundle, and ran to the assistance of A., when C. took it up, and made off with it. C. and D. were indicted for robbery, A. being the prosecutor:—*Held*, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of the prosecutor.

THE prisoners were indicted for assaulting the prosecutor, and putting him in fear, and taking from him a bundle, his property.

It appeared that the prosecutor had the bundle in his own personal custody at a beer-house; and when he came out, he gave it to his brother, who was with him, to carry it for him. While they were on the road, the prisoners

It is the duty of a magistrate to return to the Judge not only the depositions of witnesses, but also any confession taken down as made by a prisoner; and it is no excuse for not doing so that the confession was wanted to be sent before the Grand Jury.

assaulted the prosecutor; upon which his brother laid down the bundle in the road, and ran to his assistance. One of the prisoners then took up the bundle and made off with it.

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VAUGHAN, B., intimated an opinion, that, under these circumstances, the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence, against his will, either from his person or in his presence.

Austin, for the prosecution, submitted that there was evidence to go to the jury. He referred to a case in *Hale's Pleas of the Crown*, where a man's hat fell or was knocked off, and the thief took it; and, being accompanied by violence, it was held to be a robbery.

VAUGHAN, B.—But the bundle, in this case, was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it?

It was then agreed that the case should go to the jury as for a simple larceny.

A confession made by the prisoner Saxton was given in evidence: it was produced by the magistrate's clerk, who stated, in answer to a question from Mr. Baron VAUGHAN, that he had not returned it with the depositions to his Lordship, because it was wanted to be sent before the Grand Jury.

VAUGHAN, B., said, that it was his duty to have returned the confession, with the depositions, to him, according to the provisions of the act of Parliament.

The prisoners were convicted of the simple larceny.

HOME SPRING CIRCUIT, 1833.

BEFORE LORD C. J. TINDAL, AND LORD LYNDHURST, C. B.

HERTFORD ASSIZES.

BEFORE LORD CHIEF JUSTICE TINDAL.

1833.

March 2nd.

REX v. PRICE and Fifteen Others.

An indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously beginning to demolish a house, cannot be supported, unless the persons committing the outrage had an intention of destroying the house; and therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house, this was held to be not within the stat.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously beginning to demolish the Ram public-house, at Hertford, on the 11th December, 1832.

The transaction out of which this prosecution arose, occurred on the evening of the first polling-day, at the election of members of Parliament for the borough of Hertford. The election was warmly contested, and had excited much feeling among the lower orders of persons in that town. Shortly after the close of the poll, two or three persons, among whom was a man named Pitts, who were supporters of the Whig candidate, were casually met by a small party of persons who were in the interest of the conservative candidate; a quarrel and a scuffle ensued, in the course of which Pitts was repeatedly knocked down and much beaten; he then drew a knife, with which he slightly wounded one of the opposite party. A considerable crowd had by this time collected, and Pitts, being pursued by them, took refuge in the Ram public-house, the landlord of which was known to be in favour of the Whig candidate. Pitts having been admitted into the public-house, the doors and windows were all secured, and a crowd of about two hundred persons (among whom some of the defendants are

proved to have been present and actively employed), came up, carrying sticks and stones, and demanded that Pitts should be given up to them, and threatening, in case of refusal, that they would "pull the bloody house down." An attack was then made upon the house, the front door and the lower windows were beaten in, and the shutters and frames of some of the windows much broken. A portion of the mob entered the house, repeating the expressions before mentioned, and did much damage to the furniture; but, in about twenty minutes from their first approach, the mob being unable to find Pitts, and a rumour being spread that the mayor was coming, they went away.

The question was, whether the proof of these facts was sufficient to support the indictment.

TINDAL, C. J.—I am of opinion, that this offence does not come within the act of Parliament on which these parties are indicted. The persons committing the outrage must have the intention of destroying the house before they can be charged with a felonious beginning to demolish. In the present case, it is clear that they had no such intention, and that they had another intention, not within the scope of this indictment, which was merely to get possession of the person of Pitts. The prisoners must be acquitted.

Verdict—Not guilty.

Ryland and Bullock, for the prosecution.

Andrews, Serjt., *Price*, and *Dowling*, for the prisoners.

See the case of *Rex v. Thomas*, ante, Vol. 4, p. 237; and the stat. 7 & 8 Geo. 4, c. 30, s. 8, which is set out, Id. p. 238. See, also, the

charge of Lord Chief Justice *Tindal*, on the Bristol Special Commission, ante, p. 265, n.

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REX
v.
PRICE.

1833.

KINGSTON ASSIZES.

(Civil Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

POYNTER v. BUCKLEY.

Upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew that the goods were allowed to stand in the rain, and that they were improperly lotted.

CASE for an excessive distress, with a count for not selling at the best prices. Plea—General issue.

It was proposed, on the part of the plaintiff, to shew that the property distrained, which consisted of materials used by coachmakers, was kept in the rain; and that at the sale the articles were not properly lotted, and that therefore the property distrained did not sell for a good price.

Andrews, Serjt., objected, that as there was no count for treating the distress improperly, and no count for mis-managing the sale, this evidence was not receivable.

TINDAL, C. J.—I am of opinion, that, under the count for not selling at the best prices, this evidence is admissible, because the mis-management imputed is so nearly connected with the sale, and it is alleged, that, in consequence of this mis-management and neglect, the property did not sell at better prices.

The evidence was received.

Verdict for the plaintiff—Damages, 20*l*.

Platt, for the plaintiff.

Andrews, Serjt., and *Petersdorf*, for the defendant.

[Attornies—*J. Rippon*, and *Sharpe*.]

1833.

ALTEN v. FARREN.

ASSUMPSIT on a bill of exchange. Plea—General issue.

A witness for the defendant having been objected to, on the ground of interest, a release which had been previously executed by the defendant was handed to the plaintiff's counsel for him to look at.

Platt, for the plaintiff, objected to the form of it, as it did not cover liabilities which might afterwards accrue.

The release was altered to meet this objection, and the defendant re-executed it.

Platt, for the plaintiff, objected, that this release was not sufficient to render the witness competent, as it required a new stamp, it having been executed before the alteration.

TINDAL, C. J.—I think that it is quite sufficient without a new stamp, it was only handed to Mr. *Platt* for his perusal, and not absolutely delivered.

The witness was examined.

Verdict for the defendant.

Platt, for the plaintiff.

Hutchinson, for the defendant.

[Attornies—*Padwick*, and *Spence & D.*]

A defendant executed a release to a witness, but before it was given to the witness it was handed to the counsel on the opposite side, for his inspection. He objected to the form of it, and it was altered, and the defendant re-executed it:—*Held*, that it was sufficient, and that it did not require a new stamp.

1833.

March 29th.

Assumpsit for necessities supplied to the defendant's wife. The writ was sued out in June, the declaration being in November, and the record dated in November:—
Held, that the plaintiff might recover for things supplied up to the date of the record.

JOLL v. FISHER.

ASSUMPSIT for necessities supplied to the defendant's wife. Plea—General issue.

It appeared that the defendant was arrested on bailable process in this cause, in the month of June, 1832, and that the declaration was of Michaelmas Term, 1832; the record being dated on a day in that term.

Platt, for the defendant, submitted, that the plaintiff could not recover for any thing supplied after the suing out of the writ.

TINDAL, C. J.—I think that the plaintiff is entitled to recover for necessities supplied up to the time of the declaration, which is the date of the record; and I think that the writ is merely process to bring the defendant into Court.

Verdict for the plaintiff for the amount claimed up to the date of the record.

Thesiger, for the plaintiff.

Platt, for the defendant.

[Attornies—Rippon, and Toulmin.]

MASPERO v. STRACHAN.

The Judge at the assizes will not postpone the trial at the instance of the plaintiff, on the ground of the illness of a material witness, as the plaintiff can withdraw his record.

ANDREWS, Serjt., applied on the part of the plaintiff to put off the trial of this cause, on account of the absence of a material witness, on affidavits of the plaintiff and his attorney that the witness was ill.

Platt, for the defendant.—The plaintiff ought to withdraw his record.

TINDAL, C. J.—Is there any instance of such an application being granted?

1833.

MASPERO
v.
STRACHAN.

Andrews, Serjt.—I apprehend that it has been frequently done.

TINDAL, C. J.—The plaintiff has the remedy in his own hands—he may withdraw his record.

Application refused, and the plaintiff withdrew the record.

Andrews, Serjt., for the plaintiff.

Platt, for the defendant.

[Attornies—*Fawcett*, and *Smith & Co.*]

At the Sittings in London and Middlesex, applications of this kind are always refused. The only cases in which such applications are ever entertained (except at the instance of the defendant), are,

where the defendant enters the record, as is the case with indictments preferred in the Court of King's Bench, indictments removed by *certiorari* at the instance of the defendant, &c.

WELCH SPRING CIRCUIT.

1833.

BEFORE MR. BARON BAYLEY AND MR. JUSTICE PATTESON.

CARMARTHEN ASSIZES.

BEFORE MR. JUSTICE PATTESON.

1833.

REX *v.* WOOLCOCK and Another.

If an indictment on the riot act 1 Geo. 1, stat. 2, c. 1, s. 1, for remaining assembled one hour after proclamation, in setting out the proclamation omit the words "of the reign of," which were contained in the proclamation read by the magistrate—this is a fatal variance.

If the proclamation be read several times, the hour is to be computed from the first reading.

If there be such an assembly, that there would have been a riot if the parties had carried their purpose into effect—this is within the stat.; and whether there was a cessation or not, is a question for the jury.

INDICTMENT on the riot act, 1 Geo. 1, st. 2, c. 1, s. 1, for a capital felony, in remaining together one hour after the making of proclamation under that statute.

It appeared, that, on the 1st October, 1832, which was the day on which Mr. Phillips was sworn in Mayor of Carmarthen, there was a large assemblage of persons in front of the Six Bells Inn, in that town, at which Mr. Phillips was dining, and that some stones were thrown. It was proved that the proclamation contained in the riot act was read by him from a book which was produced, but the words of the proclamation contained in the book differed from the statement of the proclamation in the first count of the indictment, by containing the additional words "of the reign of."

PATTESON, J., held this to be a variance, and that the counsel for the prosecution must go upon the other counts of the indictment, to which this objection did not apply.

It appeared that the proclamation was read by Mr. Phillips a second and a third time before an hour had elapsed from the time of his reading it the first time. The

defendants were proved to have been present at the first reading.

The counsel for the defendants submitted, that the second and third readings must be considered as new warnings, and as if the former readings were abandoned; and that, therefore, the persons assembled were not guilty of a capital felony, in so remaining together till the expiration of an hour from the third reading.

PATTESON, J.—I am of opinion, that the second, or any subsequent reading of the proclamation, does not at all do away with the effect of the first reading, and that the hour is to be computed from the time of the first reading of the proclamation.

Mr. Thomas, one of the defendants, in his defence, submitted that there was no riot, and that it was at most an unlawful assembly, and cited the case of *Rex v. Birt (a)*.

PATTESON, J.—I am of opinion, that if there was such an assembly, that there would have been a riot if the parties had carried their purpose into effect, it would be within the act; and whether there was a cessation or not is a question for the jury.

Verdict—Not guilty.

Wilson and Herbert Jones, for the prosecution.

Chilton, J. Evans, Whitcombe, E. V. Williams, and James, for the defendant Woolcock.

The defendant Thomas, in person.

(a) *Ante*, p. 154.

See the stat. set forth, *ante*, Vol.

4, p. 442; *Rex v. Child*, *Ib.*; and

Rex v. James, *ante*, p. 153.

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REX
v.
WOOLCOCK.

WESTERN SPRING CIRCUIT,

1833.

BEFORE MR. JUSTICE PARK AND MR. JUSTICE LITTLEDALÉ.

WINCHESTER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALÉ.

1833.

REX *v.* EDWARDS and WARREN.

Obtaining money from a woman, by threatening to accuse her husband of an indecent assault, is not robbery.

ROBBERY. The prisoners were indicted for robbing the wife of Philip Abraham.

It was opened by *Missing*, for the prosecution, that the prisoner, under a threat of charging Philip Abraham with an indecent assault on one of them, obtained money from his wife.

LITTLEDALÉ, J.—Have you any case deciding this to be robbery.

Missing.—The nearest cases were those on the special commission in 1831.

C. Saunders, for the prisoners.—Those were cases where rioters came to the house of the husband and obtained money from the wife, the husband not being at home.

LITLEDALB, J.—I think this is not such a personal fear in the wife as is necessary to constitute the crime of robbery. If I were to hold this a robbery, it would be going beyond any of the decided cases.

His Lordship directed an acquittal.

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—
REX
v.
EDWARDS.

Verdict—Not Guilty.

Missing, for the prosecution.

C. Saunders, for the prisoners.

In many cases, where money was obtained from a person by threatening such person with an accusation of an unnatural offence, it has been held robbery. So, where money has been obtained by rioters, under a threat of burning a person's house. But, we believe, that the only instances put of robbery, where the money was obtained from one, and the injury threatened to be done another, are the following—In *Donolly's* case, 2 East, P. C. 718, Mr. Baron *Hotham* says: "In the case put in argument, of one man walking with his child, who delivered his money

to another, upon a threat, that, unless he did so, he would destroy the child, he had no doubt it was sufficient to constitute robbery;" and, in the case of *Rex v. Reans*, Id. 735, Lord Chief Justice *Eyre* says: "A man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; and he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the Judges, of a man holding another's child over a river, and threatening to throw it in, unless he gave him money."

SALISBURY ASSIZES.

BEFORE MR. JUSTICE PARK.

The APOTHECARIES' COMPANY v. COLLINS.

March 9th.

DEBT for penalties under the stat. 55 Geo. 3, c. 194, s. 20 (a), for practising as an apothecary without a certificate.

A diploma of M. D. from the University of St. Andrew's, in Scotland, is no

defence to an action for penalties under the 55 Geo. 3, c. 194, s. 20, for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company. And, *semble*, that a similar diploma from an English University would not be so.

(a) Set forth, *ante*, Vol. 1, p. 539.

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APOTH. COMP.
v.
COLLINS.

It appeared that the defendant had dispensed medicines; but that, previously to his having so done, he had obtained the diploma of a doctor of physic from the University of St. Andrew's, in Scotland.

Barstow, for the defendant, submitted, that this diploma was an answer to the present action; and he cited the case of *Smith v. Taylor (a)*.

Mr. Justice PARK.—My opinion is, that this diploma is

(a) 1 N. R. 202. In that case, Sir *J. Mansfield*, C. J., says—“Though there might be some difficulty in instituting a prosecution against a person for practising physic unlawfully, it is by no means impossible: the stat. of Hen. 8 having confirmed the charter relating to the practice of physicians, which provides, that no one shall practise physic without having been examined by the College of Physicians, and obtained letters testimonial, with an exception of persons who have taken degrees in Oxford or Cambridge. Since the union with Scotland, it has been considered, though I do not exactly know upon what ground, that a degree conferred by a Scotch University is of the same effect as a degree conferred by the University of Oxford or Cambridge, though, in looking through the articles of union, I find nothing upon the subject, except, that the four Scotch Universities shall subsist as before, with the same rights. Had the matter been attended to at the union, some express provision would probably have been made; but,

although no such provision was made, it has been generally understood, that, in consequence of the clause alluded to, a diploma granted by one of the Scotch Universities gives the same right to practise physic, as a degree at one of the English Universities, and dispenses with the necessity of being examined by the College of Physicians, and obtaining letters testimonial from thence. This right of examination is not very likely to be exercised upon persons practising physic, when it is in their power, for about 14*l.*, to obtain a diploma from a Scotch University. But a person practising physic without any authority is liable to a prosecution at the suit of any person; for, as the prohibition is general, and no particular mode of punishment is pointed out, it follows, that he who offends against the provision is liable to an indictment. There is, indeed, a good reason why such prosecutions are not instituted, arising from the difficulty of ascertaining whether a degree of diploma has been obtained or not. But the proof, though difficult, is not impossible.”

no defence in this action; indeed, I think, that even a diploma from one of the English Universities would not exempt a party from the penalties of this act (a). However, I will give you leave to move to enter a nonsuit.

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APOTH. COMP.
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COLLINS.

Verdict for the plaintiffs for one penalty,
with leave to move.

Coleridge, Serjt., and *Gambier*, for the plaintiffs.

Barstow, for the defendant.

IN the ensuing term, *Barstow* moved, pursuant to the leave given; but the Court of King's Bench refused a rule.

(a) By stat. 55 Geo. 3, c. 194, s. 29, there is a saving of the rights heretofore vested in, exercised, and enjoyed by the English Universities, and the Colleges of Physicians and Surgeons; but we believe none of those learned bodies ever authorized persons to practise as *apothecaries*.

REX v. PEGLER.

INDICTMENT for arson. A witness for the prosecution, who was in custody on a charge of felony, to be tried at these Assizes, was asked by the counsel for the prisoner—"Have you not *said* that you committed the offence for which you are now in custody?"

Mr. Justice PARK (having conferred with Mr. Justice LITTLEDALE).—My learned brother is clearly of opinion that the question ought not to be put; and I am, myself, entirely of the same opinion.

Verdict—Not Guilty.

Bingham and *Erle*, for the prosecution.

Coleridge, Serjt., and *Crowder*, for the prisoner.

See the case of *Rex v. Slaney*, *ante*, p. 213.

On the trial of an indictment for arson, a witness for the prosecution was himself in custody on a charge of felony. The counsel for the prisoner wished to ask him, "Have you not *said* that you committed the offence for which you are now in custody?"—*Held*, that this question ought not to be put.

1833.

EXETER ASSIZES.

BEFORE MR. JUSTICE LITTLEDALE.

March 20th.

REX v. ELLICOMBE.

A prisoner, tried at the assizes for arson on Wednesday the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—*Held*, that the notice was served too late. *Held* also, that the intent to defraud an insurance office being charged in the indictment, was not such notice to the prisoner as would make a notice to produce the policy unnecessary.

ARSON.—The prisoner was charged with setting fire to his own house in which he lived. The *first* count charged the offence to have been committed with intent to defraud the Sun Fire-office; and a *second* count charged an intent to defraud John Tothil, who had a mortgage on the house.

The commission day at Exeter was on Friday the 15th of March, and this case came on to be tried on Wednesday, the 20th.

The counsel for the prosecution called for the policy of insurance under a notice to produce, which had been served on the prisoner at the gaol on Monday, the 18th of March. The prisoner's home was ten miles from Exeter.

Moody, for the prisoner, objected that this service was too late; and that the notice ought to have been served before the commission day.

John Greenwood and *Sewell*, *contrà*.—As the prisoner's residence is only ten miles distant, there was ample time to have procured the policy.

Mr. Justice LITTLEDALE (having conferred with Mr. Justice PARK).—Both my learned brother and myself are of opinion, that the notice was served too late. It cannot be presumed that the prisoner had the policy with him when in custody; and the trial might have come on at an earlier period of the assize. We therefore think, that secondary evidence of the policy cannot be received (*a*).

(*a*) See the case of *Hargest v. Fothergill*, *ante*, p. 303.

The counsel for the prosecution submitted, that the intent laid in the indictment to defraud the Sun Fire-office was such a notice in pleading as to dispense with the necessity of a notice to produce.

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 v.
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Mr. Justice LITTLEDALE.—I think not (a). You must confine yourselves to the second count.

(a) In the case of *How v. Wall*, 14 East, 274, it was held, that in an action of trover for a bond, the plaintiff might give parol evidence of it to support the general description of it in the declaration, without having given the defendant notice to produce it, as the nature of the action gave sufficient notice to the defendant of the subject of the inquiry, to prepare himself to produce it, if necessary for his defence; and in that case Mr. Justice *Le Blanc* said, "where the contents of a written instrument may be proved as evidence in a cause, and it is uncertain beforehand whether such evidence will be brought forward at the trial, we see the good sense of the rule which requires previous notice to be given to the adverse party to produce it, if it be in his possession, before secondary evidence of its contents can be received, that he may not be taken by surprise. But where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice." This applies to actions where the adverse party must know what is contained in the declaration; but

in many of the most important cases of felony, the prisoner is wholly unacquainted with the contents of the indictment till it is read over to him when he pleads, that being immediately before the commencement of the trial. In the case of *Rex v. Moors*, 6 East, 421, n., which was an indictment for administering an unlawful oath, a witness swore to certain words spoken by the prisoner, by way of administering an oath, and stated, that the prisoner held a paper in his hand, from which it was supposed that he read the words. Lord *Alvanley* held, that this evidence was receivable, without giving the prisoner notice to produce the paper; and the Court of K. B. afterwards concurred in that opinion. In the case of *Rex v. Hunt*, 3 B. & A. 566, it was held, that a copy of resolutions delivered by the defendant to a witness as resolutions intended to be proposed, and which corresponded with those that the witness heard read from a written paper, was admissible, without a notice to produce the original; and in the same case it was also held, that parol evidence of inscriptions and devices on banners and flags, displayed at a meeting, was admissible without notice

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The case proceeded on the second count only.

Verdict—Not guilty.

John Greenwood and Sewell, for the prosecution.

Moody, for the prisoner.

to produce the originals. In *Spragge's* case, cited 14 East, 276, where the prisoner, who was charged with having forged a note, had got possession of it and swallowed it, *Buller, J.*, allowed parol evidence to be given of its contents, though no notice to produce had been given, as such a notice would have been nugatory.

NORFOLK SPRING CIRCUIT, 1833.

BEFORE MR. BARON VAUGHAN AND MR. BARON BOLLAND.

AYLESBURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

Feb. 27th.

REX v. HOLLOWAY.

If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of.

THE prisoner was indicted for stealing a gun from the prosecutor, who was one of the gamekeepers of the manor of Beaconsfield.

The prosecutor met the prisoner and another man, whom he knew to be poachers, on a part of the manor, and seized the prisoner; his companion came up and rescued him. The prisoner, on getting free, wrested the

gun from the prosecutor, and ran off with it. It was proved that the next day the prisoner said he should sell the gun. It was not afterwards found.

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 v.
 HOLLOWAY.

VAUGHAN, B., in summing up, said, that the prisoner might have imagined that the prosecutor would use the gun so as to endanger his life; and, if so, his taking it under that impression would not be felony; but if he took it, intending at the time to dispose of it, it would be felony.

The jury said, that they did not think that the prisoner, at the time he took the gun, had any intention of appropriating it to his own use.

VAUGHAN, B.—Then you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not a felony; and his resolving afterwards to dispose of it will not make it such.

Verdict—Not guilty.

BEDFORD ASSIZES.

BEFORE MR. BARON BOLLAND.

REX v. JAMES WARNER, WILLIAM ALBONE, JOHN BUTLER, *March 6th.*
 and JOHN CHESHAM.

THE first set of counts in the indictment charged James Warner with unlawfully, maliciously, and feloniously, as—

A gamekeeper, accompanied by his assistant, met four poachers on the high-

way, one carrying a gun, another a gun-barrel, and the other two bludgeons. There had been previously two shots fired. The gamekeeper said to his assistant, "Mind the gun;" and the assistant laid hold of it, and then the gamekeeper called to another person. Upon this three of the poachers knocked him down and stunned him; and when he came to himself, he saw all of them near him, and one said, as they passed, "Damn them, we have done them both," and one turned back and cut him on the left leg, and all then ran away. It was objected, *first*, that the wounding in the leg was the act of one alone; and there was no evidence to shew which of them it was. *Secondly*, that, from the expressions used, it was evident that both were thought to be dead; and that there could be no intent to murder, &c. *Thirdly*, that the prisoners being on the highway, the gamekeeper and his assistant had no right to interfere with them. The prisoners were convicted, and the Judges held the conviction right.

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saulting Thomas Perkins on the 3rd of December, and unlawfully cutting and wounding him on the left leg, with an intent feloniously &c., to kill and murder him, against the statute; and William Albone, John Butler, and James Chesham, with being present, aiding, abetting, and assisting the said James Warner to commit the said felony. The like with intent to disfigure Thomas Perkins. The like with intent to disable him. The like with intent to do him some grievous bodily harm.

A second set of similar counts charged Wm. Albone as principal, and the other prisoners with aiding, abetting, and assisting him.

A third set charged John Butler as principal, and the other prisoners as aiders and abettors.

Thomas Perkins, the prosecutor, was head gamekeeper to Francis Pym, Esq., and was out on duty with his brother, George Perkins, who was his assistant. On the night of the 3rd of December, they heard a gun towards Biggin wood, the property of Mr. Thornton. At that time they were near Everton wood; they shortly after heard another gun towards Biggin wood, and then went into the Everton road. They saw four people coming along the road in the direction of Biggin wood. One of the four men had a gun, another a gun-barrel, and the other two had bludgeons. The men stopped when they saw the prosecutor and his brother. It was then about half-past ten, and a light night. The prosecutor and his brother advanced towards the men, when the former said, "So, you have been knocking them down: you are a pretty set of people to be out so late at night." This was said loud. The men said something, which was not heard by the prosecutor. They were then about three yards off. The prosecutor said to his brother, sufficiently loud for the prisoners to hear, "Mind the gun." His brother caught hold of it, his hands being close to the lock. The prosecutor saw Chesham, and advanced to look at the faces of the other two, but

they bounced off. Chesham had the gun-barrel. The prosecutor then turned back towards his brother and the man who had the gun, and called out as loud as he could, "Forward Giggles." Giggles was the keeper of Mr. Thornton, but was not there. Three of the men (who had not the gun), ran in upon the prosecutor, knocked him down, and stunned him; when he recovered himself he saw all the men coming by him; and one said, "Damn 'em, we've done 'em both." They had got two or three paces beyond him, when one of them turned back. The prosecutor saw what he thought was a stick, and was struck with it a violent blow on the left leg. When he got home he examined his leg, and found a hole had been cut through his leather gaiter and stocking, and that he was wounded in the leg. The wound was about an inch long. After he was so struck on the leg, the men set off and ran away. The prosecutor then got up, and saw his brother lying by the side of the road, and groaning. He helped him up, and they went towards home. The prosecutor had committed no assault on either of the four men. When the prosecutor said, "Mind the gun," he made no gesture. The prosecutor was smothered with blood in his mouth, and could not move hand or foot after he was knocked down. He could not tell how long he lost his senses.

George Perkins said, he and his brother were on the road leading from Templeford; and when about two hundred or three hundred yards from Biggin wood, he saw four men coming, about one hundred yards off. They moved on, and when they were within twenty yards, he saw that one had a gun; they came closer, within about seven yards, and he then saw that one had a gun-barrel, and that the other two had bludgeons. Prosecutor said, "Hollo! my lads, you been knocking 'em down?" He was then thirty yards from them. He spoke loud. They said something loud, which witness could not understand. When they got close to them, prosecutor said, "Mind him with the gun." Witness took hold of the gun gently; placing one hand on the stock, and the

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other on the barrel. It was a detonator, and witness took off the cap gently. The man did nothing. When the witness laid hold of the gun, one of the others came up within a yard of him, and said, "This is not his manor." That man had the gun barrel. It was Chesham. The man who had the gun was Warner. Witness had had hold of the gun two minutes, and his brother called out, "Forward Giggles," quite loud. Witness also hallo'd "Forward Giggles;" when one of the four men said, "Damn it, we wont stand this." It was not the man with the gun. The three then stepped up to his brother, and witness saw them strike him. Witness turned the man round who had the gun, by turning the barrel. At this time the prosecutor and the three men were about seven yards off. One of the three came running to witness (he had a stick), and knocked him down. As he was striking at witness, the man who had the gun rather drew back to avoid the blows, and said three times "Don't hit me." Witness was stunned on the head, fell down, and remembered nothing further. Witness did nothing but lay hold of the gun. When they first saw the men, they did not shew any desire to avoid witness and his brother, or prevent them going on. Witness took hold of the gun to prevent the man's running away, but did not tell him so. He took hold of it gently, to let his brother see if he knew them. There was no struggle. The man did not say any thing. No name had been used when the man said, "This is not his manor." It was Mr. Thornton's manor. Up to that time nobody had been assaulted. The man with the gun did not seem angry at witness's holding it. It was a public road. Mr. Thornton's manor extends more than two or three hundred yards beyond where witness and his brother saw the men. The man did not attempt to wrench the gun from witness when he took off the cap.

The two men who had bludgeons were afterwards proved to be the other two prisoners, Butler and Albone.

Praed and *Byles*, for the prisoners, objected that the blow on the leg, under the circumstances proved, was the act of one alone; and there was no evidence which of the prisoners inflicted it. *Secondly*, that, before the blow was given, one of the prisoners said, "Damn 'em we've done 'em both." And it must be taken, therefore, that it was supposed both men were dead; and, however the party giving the blow might have intended to inflict insult on the body, he could not have had any such intention to murder, &c., as was charged in the indictment. *Thirdly*, that the prisoners were on the high road, and the prosecutor and his brother had no right to obstruct them. They cited *Rex v. Hawkins (a)*.

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BOLLAND, B., told the jury, that it was proved that George Perkins had taken hold of Warner's gun, but that the prosecutor had done nothing to justify the assault upon him; and that, as to the infliction of the wound in the leg, if they thought the prisoners were acting in concert, they were are all equally guilty.

The jury convicted the prisoners, but recommended them to mercy on two grounds—*first*, because the provocation was first given by the prosecutor's brother; *secondly*, because it happened off the prosecutor's manor.

The case was afterwards submitted to the consideration of the Judges; who, after hearing the counsel on both sides, certified that they were of opinion that the conviction was right.

Storks, Serjt., and *Smith*, for the prosecution.

Praed and *Byles*, for the prisoners.

[Attornies—*Chapman*, and *Rogers*—*Hankin*.]

(a) *Ante*, Vol. 3, p. 392. That case decides, that if a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them return and steal his money, &c.; that one only can

be convicted of the robbery, as it was not in pursuance of any common intent.

See the cases of *Rex v. Edmeads*, *ante*, Vol. 3, p. 390, and *Rex v. Whitthorne*, *Id.* p. 394.

1833;

BURY ASSIZES.

BEFORE MR. BARON VAUGHAN.

March 17th.

REX v. TUBBY.

A statement relating to an offence made upon oath by a person not at the time under suspicion, is admissible in evidence against him, if he be afterwards charged with the commission of it.

THE prisoner was indicted for burglary.

B. Andrews, for the prosecution, proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion.

Prendergast, for the prisoner, objected that it was a violation of that rule of law, which held, that a prisoner should not be sworn.

VAUGHAN, B.—I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it the statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it.

Andrews stated, that, having read through the paper, he did not find any thing material in it, and therefore would withdraw it, although he had no doubt of its being evidence.

VAUGHAN, B.—Very well; otherwise I should certainly have received it. I have no doubt upon the subject.

The prisoner was convicted.

B. Andrews, for the prosecution.

Prendergast, for the prisoner.

**OXFORD SPRING CIRCUIT,
1833.**

BEFORE MR. JUSTICE J. PARKE, AND MR. JUSTICE TAUNTON.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

1833.

WILLSON v. DAVENPORT and Another.

Feb. 25th.

REPLEVIN.—The defendants avowed for 30% rent in arrear. The first avowry stated the rent to be payable yearly; the second stated it to be payable half-yearly; and the third, quarterly. Pleas to the first avowry, *non tenuit* and *riens in arrear*; and the like pleas to the second and to the third avowries.

On the part of the defendants it was proved, that the plaintiff had taken certain lands of them, at a rent of 30% a-year, payable half-yearly.

Curwood, for the plaintiff, opened that the lands in question, together with other property, had been conveyed to the defendants as trustees, to receive the rents and profits, and to pay them over in certain shares; one of which shares belonged to the plaintiff in right of his wife; and he

A. rented land of B., who was trustee of certain property (a part of which was this land), the rents of which B. was to pay in certain shares; one of those shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife than the rent amounted to:—*Held*, that this could not be set off against the rent without a special agreement to that effect.

In replevin, a defendant avowed for rent payable yearly, for rent payable half yearly, and for rent payable quarterly; and to each of these avowries the plaintiff pleaded *non tenuit*, and *riens in arrear*. A holding at a rent payable half yearly was proved, and the jury were directed to find for the plaintiff on the 1st and 5th issues; for the defendant on the 3rd and 4th; and the jury were discharged on the 2nd and 6th issues.

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opened, that the defendants had in their hands a greater sum, which was due to the plaintiff as his wife's share of the profits, than the rent in question amounted to; and that, therefore, the plaintiff was entitled to a verdict on those issues which were taken on the *riens in arrear*.

Mr. Justice J. PARKE.—I think that this trust money, due to the plaintiff in his wife's right, cannot be set off against the defendant's claim for rent in arrear, without a special agreement to that effect. The defendant has, therefore, no legal answer to the claim for rent; and the verdict must be for the plaintiff on the first and fifth issues; for the defendant on the third and fourth issues; and the jury must be discharged from giving any verdict on the second and sixth, as those issues become immaterial.

Verdict accordingly (a).

(a) By the General Rules of all the Courts, H. T. 2 W. 4, r. 74, "No costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." In *Cox v. Thomason*, a MS. case cited in Mr. Jervis's edit. of the new rules of the Courts (p. 84), and which came before the Court of Exchequer, T. T. 1832, it was decided that a distinct issue is raised upon each count of a declaration by the general issue pleaded generally to the whole declaration; and that this rule applies to every taxation occurring after the first day of Easter Term. The declaration, in case, contained eighteen counts, nine for a malicious prosecution, and nine for slander; the Jury found for the plaintiff on

three counts, with 40s. damages; and for the defendant on the remaining fifteen, and the *postea* was entered accordingly. The Master in taxation disallowed the plaintiff's costs on the fifteen counts on which the defendant had a verdict, but did not deduct the defendant's costs on those counts from the plaintiff's costs. On motion to review the taxation, *Bayley*, B., expressed his opinion, that each count was a separate issue within the meaning of the rule, so that the costs of the defendant on the fifteen counts ought to have been deducted from the plaintiff's costs; and, on the 29th May, he said, that all the Courts agreed that the costs of the issues found for the defendant should be deducted from the plaintiff's costs; and that the true construction of the rule was, that the general issue raised

Curwood and *Carrington*, for the plaintiff.

Talfourd, Serjt., and *Justice*, for the defendants.

[Attornies—*Bartlett*, and *Davenport*.]

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a distinct issue on each count. He added, that the King's Bench and Exchequer agreed that the rule applied to every taxation occurring after the first day of Easter Term, though the cause might have

been tried before that day; and the Common Pleas did not differ upon this last point, although they did not entertain so strong an opinion upon it.

OXFORD ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

—
 REX v. PRATLEY.

Feb. 27th.

LARCENY. The indictment in the *first* count charged the prisoner with stealing a truss of hay, the property of Thomas Cheatle; and the *second* count stated it to be the property of Thomas Baylis.

It appeared that Cheatle had sent three trusses of hay, consigned to Baylis, by the prisoner's cart; and that the prisoner had taken away one of the trusses, which was found in his possession, but not broken up.

Mr. Justice J. PARKE.—This is no larceny, as the prisoner did not break up the truss. The prisoner must be acquitted.

Verdict—Not guilty.

Phillimore, for the prosecution.

[Attorney—*J. Scarlett Price*.]

In 3 Inst. 107, Lord Coke says,
 "If a bale or pack of merchan-

dize be delivered to one to carry
 to a certain place, and he goeth

A. had consigned three trusses of hay to B., and had sent them by the prisoner's cart. The prisoner took away one of the trusses which was found in his stable, but not broken up:—*Held*, no larceny, as the prisoner did not break up the truss.

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away with the whole pack, this is no felony; but if he open the pack, and take any thing out *animo furandi*, this is larceny. Likewise, if the carrier carry it to the place appointed, and after

take the whole pack *animo furandi*, this is larceny also, for the delivery had taken his effect, and the privity of the bailment is determined; and so it is of a tun of wine, or the like, *mutatis mutandis*."

March 1st.

REX v. FREEMAN.

The prisoner had worked for the prosecutor, sometimes as a regular labourer, and sometimes as a rounds-man; but, at the time in question not being at all in the prosecutor's service, he was sent by the prosecutor to get a check cashed at a banker's; for doing which he was to be paid sixpence. He got the cash, and made off:—*Held*, no embezzlement, as the prisoner was not a servant of the prosecutor within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 47.

EMBEZZLEMENT. The prisoner was charged, under the stat. 7 & 8 Geo. 4, c. 29, s. 47, with having embezzled a sum of 1*l.* 19*s.* 8*d.*, the property of James Freeman. The indictment alleged, that he was the servant of James Freeman.

It appeared that the prosecutor had given the prisoner a check, which he was to get cashed at the Bicester bank, and bring back the money to the prosecutor. The prisoner obtained the money at the bank, and applied it to his own use. It further appeared that the prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a rounds-man, for a day at a time; and that he had several times before been sent to the bank for money. It however appeared, that, on the day in question, the prisoner was not working for the prosecutor, and that he was to be paid sixpence for fetching this money from the Bicester bank.

Mr. Justice J. PARKE, (having conferred with Mr. Justice TAUNTON).—My learned brother agrees with me in opinion that the prisoner was not a servant of the prosecutor within the meaning of the act of Parliament, and that this is therefore no embezzlement.

Verdict—Not guilty.

Abbot, for the prosecution.

[Attorney—White.]

In the case of *Rex v. Spencer*, R. & R. C. C. R. 299, the priso-

ner had applied to a person named Boynton, a carrier, to give him

employment, and Boynton agreed to let him carry out parcels and go on messages when the prisoner had no other employment; for which Boynton was to give him what he should think fit. On the fourth day of his being in this employment, Boynton gave him an order, upon which he was to

receive 2*l*.: he received the money, and embezzled it. *Bayley*, B., entertained some doubt whether he was a servant within the 39 Geo. 3, c. 85 (the act then in force as to embezzlement), and reserved the case; but all the Judges held the conviction right.

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REX v. COOPER and WICKS.

March 2nd.

ARSON. The indictment in the *first* count charged the prisoner Cooper with having set fire to a stack of straw; in the *second*, with having set fire to a stable; in the *third*, two barns; and in the *fourth*, two outhouses: and the prisoner Wicks was charged in each count as an accessory before the fact.

It appeared that the straw stack had been set on fire, and that the fire had communicated to a stable, an outhouse, and two barns which were adjacent, and which were all destroyed.

It was proposed, on the part of the prosecution, to give in evidence a confession of the prisoner Cooper. It appeared that the committing magistrate, Mr. Simeon, had told him, that, if he would make a disclosure, he (Mr. Simeon) would do all that he could for him.

Mr. Justice J. PARKE.—We must not hear what he said after this.

The prisoner Cooper, after he had been committed,

The committing magistrate had told a prisoner that he would do all that he could for him if he would make a disclosure: after this, the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess:—*Held*, that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution.

If a person set fire to a stack, the fire from which is likely to, and which does, communicate to a barn, which is thereby burnt,

the person is indictable for burning the barn.

It is not essential that there should have been any direct communication between an accessory before the fact and the principal felon. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even if the accessory does not name the person to be procured, but merely direct the agent to employ some person.

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made a statement to the turnkey of Reading Gaol. The turnkey had held out no inducement to him to confess, and had not given him any caution not to confess.

Carrington, for the prisoners, objected that this statement was not receivable after what had been said to the prisoner Cooper by Mr. Simeon.

Mr. Justice J. PARKE.—I think that I ought not to receive the evidence after what Mr. Simeon said to the prisoner, more especially as the turnkey did not give any caution to the prisoner (*a*).

The statement was not received.

It was proved, by a king's evidence named Maskell, that the prisoner Wicks had desired him to tell the prisoner Cooper to set the place on fire at the straw stack; and that he told Cooper accordingly; but did not inform Cooper that he did so at the desire of the prisoner Wicks.

Mr. Justice J. PARKE.—The prisoner Cooper is charged with setting fire to two barns, &c., as well as to the straw rick, to which the fire seems, in the first instance, to have been applied. However, if a person set fire to a stack, the fire from which is likely to, and which does, communicate to a barn, which is thereby burnt, he is in point of law indictable for setting fire to the barn (*b*). With respect to an accessory before the fact, it is not necessary that

(*a*) If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement made by a prisoner, under such circumstances, would be receivable; as it

seems to be but a fair conclusion, that what was said to the prisoner by a magistrate would be much more likely to operate on his mind than any thing subsequently said to him by a constable.

(*b*) See the charge of Lord Chief Justice *Tindal*, *ante*, p. 266, (*n*).

there should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person.

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Verdict—Guilty.

Talfourd, Serjt., *Curwood*, and *Shepherd*, for the prosecution.

Carrington, for the prisoners.

[Attornies—*Newbery*, and *Neale*.]

WORCESTER ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

—
 REX v. BOULTON.

March 4th.

LARCENY. The prisoner was charged with stealing a bible, a hymn book, and a pair of brass sconces, the property of John Bennett and others.

It appeared that the bible and hymn book were presented to the society of Wesleyan Methodists at Feckenham, from which chapel they had been stolen. It further appeared, that the books had been bound at the expense of the society; and it was stated by Mr. Bennett, that he was one of the trustees of the chapel, who had bought the sconces, and was also a member of the society, which consisted of about sixty-two members. No trust deed was produced.

A bible had been given to a society of Wesleyans, and it had been bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust deed was produced:—*Held*, that in an indictment for stealing the bible, the property was rightly laid in B. and others.

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Shutt, for the prosecution, cited the case of *Rex v. Hutchinson* (a).

Mr. Justice J. PARKE.—I think, as Mr. Bennett is one of the society, the property in the books is well laid in him and others.

Verdict—Guilty (b).

Shutt, for the prosecution.

Carrington, for the prisoner.

(a) R. & R. C. C. R. 412. In that case it was held, that the goods in a dissenting chapel, vested in trustees, cannot be described as the goods of a servant, who has merely the custody of the chapel and things in it to clean and keep in order, though he has the key of the chapel, and no other person but the minister has another key.

(b) By the stat. 7 & 8 Geo. 4, c. 29, s. 10, it is enacted, "that if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon." However, it seems, that in this enactment the legis-

lature did not intend to include the chapels of dissenters; because, in the stat. 7 & 8 Geo. 4, c. 30, ss. 2, 8; and in the stat. 7 & 8 Geo. 4, c. 31, s. 2, in which they are meant to be included, the words are "any church or chapel, or any chapel for the religious worship of persons dissenting from the united Church of England and Ireland, duly registered or recorded." Those statutes received the royal assent on the same day as the stat. 7 & 8 Geo. 4, c. 29. It is also worthy of observation, that the words "church or chapel," are to be found in the 1 Edw. 6, c. 12, s. 10, which related to the offence of sacrilege, there being then no chapels of dissenters in existence.

1833.

REX v. RICHARD ENOCH and MARY PULLEY.

March 6th.

MURDER. The *first* count of the indictment charged the two prisoners with the wilful murder of the female bastard child of the prisoner Mary Pulley, by stabbing it in the head with a fork. The *second* count charged that they killed the child with their hands. The *third* count charged, that, before the child was completely born, the prisoners stabbed it with a fork, and that it was born, and then died of the stab. The *fourth* count was similar to the third, except that it charged the child to have been killed by the hands of the prisoners, and not with a fork.

If a child has breathed before it is born, this is not sufficiently life to make the killing of such child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose.

A puncture was found in the child's skull; but, when the injury that had caused it was inflicted did not appear: some questions were asked as to whether the child had breathed.

A man and woman being apprehended on a charge of murder, another woman, who had the female prisoner in custody, told her that she "had better tell the truth, or it would lie upon her, and the man would go free."—

Mr. Justice J. PARKE.—The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder.

Held, that a declaration of the female prisoner, made to this woman afterwards was not receivable in evidence.

Godson.—The wound might have been given before the child was born, and the child might have lived afterwards.

Mr. Justice J. PARKE.—Yes, but there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose.

It was proposed to give in evidence a declaration of the female prisoner; the witness called to prove it, whose name was Abigail Commander, said—"I was placed by the constable with the prisoner Mary Pulley, while he went to the inquest. I was placed with her to prevent her from laying violent hands on herself, and to prevent her from going away. I told her to the effect, that she had better tell the truth or it would lie upon her, and the man would go free."

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Curwood, for the prisoner Mary Pulley.—I submit that any thing the prisoner said after this cannot be received in evidence; a confession ought to be perfectly voluntary. Here there was an allurement held out to her to make a statement; and a statement after that cannot be considered as made voluntarily.

Whateley.—This is in effect an inducement to make the prisoner criminate herself; because, in attempting to charge another person, she may shew her own connexion with a felonious transaction.

Godson, contra.—It has never been held that a prisoner's being induced to free himself from the charge, is a ground for rejecting what he has said.

Mr. Justice J. PARKE, (having conferred with Mr. Justice TAUNTON).—I have conferred with my learned brother on this point; and as this declaration of the female prisoner can only be legitimately received in evidence to affect her and no one else, we think that it is not receivable, as it was made after an inducement held out by a person who had her in custody. If it were to be used at all, it could only be used to criminate her; and then it would be evidence obtained to criminate her by means of an inducement.

The declaration was rejected.

Verdict—Not guilty.

Godson and *Whitmore*, for the prosecution.

Curwood, for the prisoner Mary Pulley.

Whateley, for the prisoner Richard Enoch.

[Attornies—*Gwinnell*, and *John Parker*.]

It may be a question whether a child has a completely separate circulation till the umbilical cord is divided; because, if that be divided, and not properly secured, the child would bleed to death;

which would rather lead to an inference, that while it is undivided, some, at least, of the blood circulates through it. With respect to the killing of a child *en ventre sa mere*, Lord Coke lays down, that, "if a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder. But, if the child be born alive, and dieth of the potion, battery, or other cause, this is murder." In support of this position, he cites the following passage from Bracton, (lib. 3, fol. 21). "*Si aliquis qui mulierem pregnantem percusserit, vel ei venenum dederit per quod facerit abortivum, si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium.*"—And he also cites Fleta as confirming this doctrine. 3 Inst. 50.

In 1 Curw. Hawk. book 1, ch. 13, s. 16; 1 Ea. P. C. 227, and 1 Russ. Cr. & Misd. 424, the same doctrine is laid down. However, Lord Hale (1 H. P. C. 433), lays down, that if a woman is quick, or great with child, if she take, or another give her, any potion to make an abortion; or if a man strike her, whereby the child within her is killed, it is not murder, nor manslaughter, by the law of England. So it is, if after such child were born alive and baptized, and after die of the stroke given to the mother, this is not homicide. And Staun. 21 acc.

The only case on this point that we are aware of, is to be found in the Year Book, 1 Edw. 3, p. 23, pl. 18, which is as follows:—

"Brief issist al vic. de Glouc.

de predr', un D. q' p. tesmoign. de Sir G. Scrop duist aver batu un feme grosse ensient de deux enfants issint q' maintenant apres l'un enfant morust et fuit del alter deliver q' fuit baptise John p. nosme et deux jours apres p. le male q' l'enfant avoit il morust: et le indictine't fuit returne devant Sir G. Scrop et D veign' et pled de rien culp et p' ceo q' les Justices ne fuerent my en volunte de adjudge cest chose felonie l'endictee fuit lesse a mainprise e puis la parol demurra sans jour issint q' brief issust come devant et dit q' Sir G. Scrop rebersa tout le case et coment il venit et pled—Herle au vic' faits vener son corps etc. et le vic' returne le br'e al bailie de la franchise de tiel lieu q' disoyent q' mesme celvy fuist pris p' le Major de Brist, mes la cause de l'a prisel *penitus ignoramus*, &c."

Lord Coke, 3 Inst. 51, denies this case to be law; but Lord Hale cites it as authority. The stat. 9 Geo. 4, c. 31, s. 13, makes it a capital offence to procure the miscarriage of a woman quick with child, and a transportable offence to procure the miscarriage of any woman not quick with child. And the same stat. s. 13, makes the concealment of the birth of a dead child a misdemeanor; but it seems, that the first and second of these offences must be committed by some person *other than the woman herself*; and it also seems, that the third can only be committed *by the woman herself*. As to whether the birth of a dead child can be considered a miscarriage or abortion, after the seventh month of pregnancy, see Carr. Supp. App. xxx.

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1833.

STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE J. PARKE.

*March 13th.*EARLE and Wife *v.* PICKEN.

What a party says is evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper.

ISSUE from the Court of Chancery to try at what period a certain conversation occurred, with a view of determining whether or not it operated as notice.

The plaintiff's counsel wished to ask a witness for the defendant, whether he had not heard the defendant say, that Mr. Symonds had agreed to give 14,000*l.* for the estate in question.

Maule, for the defendant.—I submit that this cannot be asked. It is giving evidence of the contents of a written agreement.

Mr. Justice J. PARKE.—What a party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to any thing else.

The question was put.

Verdict for the defendant.

Jervis, R. V. Richards, and *Bishton*, for the plaintiffs.

Maule and *Whateley*, for the defendant.

[Attornies—*Stanley*, and *Corser*.]

In the course of this circuit, Mr. Justice *J. Parke* several times observed, that too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness

has misunderstood what the party has said, but that, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say.

1833.

COCKAYNE *v.* HODGKISSON.

March 14th.

LIBEL. Plea—General issue.

It appeared that the father of the plaintiff had been for some years gamekeeper of the Marquis of Anglesey, and that the plaintiff wished to become his Lordship's gamekeeper, and overlooker of fences for the Haywood Park farm, of which the defendant, who was about seventy years old, was the tenant. The libel was contained in a letter sent by the defendant to the Marquis of Anglesey, which letter was as follows:

“To his Excellency the Marquis of Anglesey, Dublin Castle, Ireland.

“*Haywood Park, May 4, 1832.*

“Your Excellency the Marquis of Anglesey.—I most humbly and heartily thank your Lordship for the benefit I have received since I wrote to you in February, respecting the deer and rabbits troubling me so very much; and as an opportunity offers itself to make a tender to your Lordship of my poor but real and sincere wishes to supply you with a good stock of game upon my land, which I hold as tenant; and I shall feel much more comfortable could I receive a tender from you or your agent, for me to take the management of the game, which I will execute with all personal gratitude and punctuality. The actual reason that I wish to try my skill is, that I understand, please your Lordship, it is intended to allow John Cockayne to be admitted into the cottage to take charge of the game and the repairing of the fences; but, my Lord, I have found great deficiency with John Cockayne's and his father's character, both of which are not becoming to gamekeepers; they both appear in the behalf of encouraging poaching and destroying game. If your Lordship will

Every wilful unauthorized publication, injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interest of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice.

A., being a tenant of B., was desired by B. to inform him if he saw or heard any thing respecting the game. A. wrote a letter to B., informing B. that his gamekeeper sold game:—*Held*, that if A. had been so informed, and believed the fact to be so, this was a privileged communication, and that the gamekeeper could not maintain any action for a libel.

In such a case the defendant may give in evidence representations made to him as to the conduct of the gamekeeper, but cannot go into evidence of acts done by the gamekeeper.

dant may give in evidence representations made to him as to the conduct of the gamekeeper, but cannot go into evidence of acts done by the gamekeeper.

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favour me with communicating your real wish and intentions to Mr. Hodson, and thereby cause him to hold a strict investigation of the Cockaynes' characters, from the witnesses I can bring to prove that which will not be very pleasing to your Lordship's wishes. If you think that I am not a sufficient person to hold the situation which I ask from your Lordship, you will very much oblige me if you will inquire of any of the neighbouring nobility and gamekeepers; for, was it in Cockayne's power to retain so good a character as I can, there would be no fault to be found with him on my behalf; as I am uncertain whether they have had any one to uphold them in their unbecoming behaviour, for, had they looked after the game, and fed it as they ought to have done, there might have been a great deal more game killed, from the quantity of pheasants fed on my corn all the summer season; but they were not half attended to as they ought to have been: but, please your Lordship, their play has been to find something out against me, and to put young Cockayne into the cottage, where, if he could regain his aim, he would carry on a pretty game of defraud upon your Lordship's property; as I can bring a respectable man to prove that young Cockayne offered to dispose of your Lordship's game to the said man, and likewise told him that he, Cockayne, had sent hares to Birmingham, and sold them for a good price, and moreover told him, that if he wanted some to send to the same place, he would keep him some, but cautioned the man not to let any one know; and by that means he thought he had no right to kill game on a nobleman's estate like your Lordship's, and dispose of it in such a manner, so he would have nothing to do with him or the game, with the exception of a rabbit or two. He was to meet him at a certain place. For I have had a great mind to have given them notice to keep off my land. But, please your Lordship, I thought I would inform you of the transactions of young Cockayne. As to his father, I must omit for want of room, but notice is what they deserve off your Lordship's estate altogether; but perhaps

their characters have been stated quite differently to your Lordship. But, in regard to what I have said, you will find it quite correct, if your Lordship will inquire into it, or cause it to be done; and if you will give me permission, I will transact what I have offered much better than it has been done since I became tenant to your Lordship; but with regard to the Cockaynes, I will not allow them to set a foot on my land, until things are settled and proved on both sides. William Cockayne has been in the habit of cohabiting and drinking with the Stafford poachers to a great excess.

“Believe me, from your most humble and obedient servant, &c.

“Thomas Hodgkisson.”

R. V. Richards, for the defendant, opened, that the defendant had been directed by the Marquis of Anglesey to look after the game on his Lordship's estate, and to report to him on the subject; and he submitted that it became the duty of the defendant to write letters to the noble Marquis respecting the game; and that any letter so written was a privileged communication; and that, therefore, no action would lie against the defendant, if he acted without malice, and believed what he wrote to be true.

The defendant's counsel proposed to prove that the plaintiff associated with poachers.

Mr. Justice J. PARKE.—I cannot allow you to do that. You may give evidence of any representation on the subject that had been made to the defendant before he wrote the letter.

R. V. Richards.—Suppose that we prove that the fact was notorious, the jury, without our being able to prove who was the particular person that told the defendant, would be convinced that he must have heard of it.

Mr. Justice J. PARKE.—Then you must prove the rumour, and not the fact.

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Jervis, for the plaintiff.—Is not that going too far, my Lord?

Mr. Justice J. PARKE,—It is going a great way, but I think I must receive that evidence.

The evidence was not given.

R. V. Richards proposed to shew what the defendant had heard respecting the plaintiff's father.

Jervis.—That can have nothing to do with the present action.

Mr. Justice J. PARKE.—I think I must receive it, because the whole letter must be read together; and it is a question of *bona fides*.

R. V. Richards proposed to give evidence of the bad state of the fences.

Mr. Justice J. PARKE.—I think that is not admissible, as the letter makes no charge against the plaintiff in respect of the fences.

The following evidence was given on the part of the defendant.

Mr. Hodson said—I am the agent of the Marquis of Anglesey, and have been so for twenty-seven years; the noble Marquis wished to have the game preserved on the Haywood Park farm; I communicated that to the defendant, and told him he should report if he saw any thing wrong. I expected, that if any thing had been wrong, the defendant would have reported it to me. Lord Anglesey receives reports continually from his tenants. I know it, as any thing relating to the land is sent to me.

James Hodgkisson said—I am the son of the defendant. In the year 1829, the Marquis of Anglesey was out shooting; he came to my father's and said, "Hodgkisson, you are an old man, used to live with gentlemen who have pre-

served game in the strictest degree, and if ever you hear or see any thing respecting the game on my land, I desire you to inform me about it." I communicated to my father, that I had heard that the plaintiff and his father were connected with poachers; it was after that, that this letter was written.

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Thomas Brown said—I am a tailor; I was at Rugely; the plaintiff was there; it was at the Dog and Partridge; I had a conversation with the plaintiff, which I communicated to the defendant. The plaintiff wanted me to make him a suit of clothes, and take game in part payment; I asked the defendant if the plaintiff had any right to give away game or sell it. He told me that he had not, and advised me to have nothing to do with the plaintiff. The plaintiff told me, that if I wanted any game, either for my own use, or for sale, he would help me to it; and he added, that I could, if I chose, send hares to Half Moon Street, Birmingham, and get 7s. a head for them, as he had done the year before. I told him I did not want any, but I should like a small rabbit for my little girl, who was ill.

William Padmore said, I am assistant bailiff to Mr. W. Smith, he is bailiff of a hundred, and I have followed the profession many years. I told the defendant, that I had seen the plaintiff's father at the Star, and that his, the defendant's, name was brought into question. I told him also, that the plaintiff was inviting the people to come and kill the game, and that the plaintiff said, if they would come, he would find them scales, fur, or feathers. Five or six who were in the company catch game, they were what I call poachers; I also told the defendant that I had seen the plaintiff's father drunk several times.

Mary Russell said—I told the defendant that Thomas Brown had told me, that the plaintiff had offered to find him in game off Haywood Park farm, if he would make him a suit of clothes.

Jervis in reply.—The question here is, whether this was a letter which the defendant wrote in discharge of a

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duty he owed to the Marquis of Anglesey, or whether it was written maliciously. Looking at the letter, there is an abundance of passages which shew that it was a malicious and not a privileged communication.

Mr. Justice J. PARKE (in summing up).—The propositions of law which are applicable to this case I shall state to you in a few words. Every wilful unauthorized publication, injurious to the character of another, is a libel, and every such publication is, in a legal sense, malicious; however, if all that is contained in a libel be strictly true, the person libelled has no right to maintain an action for it; and it is on a different principle that truth is no justification of a libel in criminal cases, as many libels, which are quite true, would endanger a breach of the public peace. Still, if the present libel had been true, it was the duty of the defendant to have pleaded a justification, which he has not done; and you will therefore not inquire whether the allegations contained in this letter are true or not. I have already said, that every wilful and unauthorized publication, to the injury of the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of another, that which he writes under such circumstances is a privileged communication. The first question is, whether it was the duty of the defendant to make communications to the Marquis of Anglesey in respect of any neglect of duty in his gamekeepers. If he was desired to do so by the noble Marquis, or his agents, any communication he made would be privileged, if he wrote it *bond fide*, and considering that he was doing his duty to the Marquis as his landlord. If it was the duty of the defendant to make the communication, this case falls within the principle of many other cases. To write of another, that he is a thief, is a libel; but if one gentleman asks another gentleman respecting a servant's character, and he writes that the ser-

vant was a thief, he is protected, if he acts *bond fide*. You will say in the present case, whether the defendant was told these stories, and whether he believed them to be true. You will also look at the letter, and say whether you consider it such a letter as a man would write to the Marquis of Anglesey, merely wishing to put him on his guard, and to cause him to institute an inquiry; or whether you think that the defendant was actuated by malice, and wished to supplant the plaintiff, and get the killing of the game for himself. In the former case, the defendant is entitled to a verdict, and in the latter, the plaintiff; indeed, the plaintiff is also entitled to a verdict, if you think that there had not been any direction given to the defendant by or on behalf of his landlord, for the defendant to communicate with him, for in that case the letter would be unauthorized and libellous.

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Verdict for the defendant.

Jervis and Whateley, for the plaintiff.

R. V. Richards and *W. J. Alexander*, for the defendant.

[Attornies—*A. Flint*, and *C. Flint*.]

REX v. CAPEWELL and PEGG.

INDICTMENT on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching. The *first* count of the indictment stated, that the prisoners, together with another person unknown, being armed, entered together into a field called the Nineteen Acres, in the night time, for the purpose of *then and there* taking game. The *second* count was similar, except that it stated the name of the occupier of this field instead of the name of the field itself. The *third* count stated,

A count in an indictment for night poaching stated, that the prisoners were in a field called A., for the purpose of *then and there* taking game:—*Held*, that the prisoners could not be convicted on that count, unless the jury were satis-

fied that the prisoners had an intention of taking game in that particular field.

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that the prisoners entered into certain inclosed land belonging to Sir Robert Peel.

It appeared that the prisoners were seen in the Nineteen Acres; but it was not shewn that they were doing any act tending to the destruction of game in it. There was a wood adjoining the Nineteen Acres to which they were going, and another wood from the direction of which they were coming; and in which shots had been previously heard. Both the woods (which were inclosed), and the Nineteen Acres, belonged to Sir Robert Peel.

Greaves, for the defendants, submitted, that the jury ought not to convict on the first and second counts, unless they were satisfied that the defendants entered into the Nineteen Acres for the purpose of killing game in that very field; and he cited the case of *Rex v. Barham (a)*.

Mr. Justice J. PARKE (in summing up).—The first two counts make it necessary to shew that the defendants were in the field called the Nineteen Acres, for the purpose of killing game there; but the third count is applicable to the wood; and the question on that count will be, whether the defendants were not in the wood for that purpose.

Verdict—Guilty.

Whateley, for the prosecution.

Greaves, for the defendants.

[Attornies— ———, and *Jones*.]

(a) R. & M. C. C. R. 151. In that case the indictment charged that the prisoner entered into a certain close, with intent *then* and *there* to destroy game. It was left to the jury to say, whether the defendant entered that particular close intending to kill game there. The jury found that the defendant was in pursuit of game, but whether in

that close or not they could not say. The defendant was convicted, but the twelve Judges held, that the conviction was wrong; and that, inasmuch as the entry with intent to kill game was confined by the indictment to the close specified, it was therefore necessary to prove the intent as to that close.

REX v. FINACANE and WILLIAMS.

NIGHT poaching. The *first* count of the indictment was on the stat. 9 Geo. 4, c. 64, s. 9, for entering inclosed land with another person armed, for the purpose of killing game. The *second* count was framed on sect. 2 of the same statute, for assaulting gamekeepers authorized to apprehend. The *third* count was for assaulting the gamekeepers in the execution of their duty. The *fourth* count, for a common assault.

A count for night poaching may be joined with a count on sect. 2 of the stat. 9 Geo. 4, c. 69, for assaulting a gamekeeper, authorized to apprehend, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault.

Greaves, for the defendants.—I submit that the counsel for the prosecution ought to be put to their election as to which count they will go upon. The judgment in the first count is different from that on the last; indeed, the offences are triable by different Courts; one may be tried at the sessions, whereas the other must be tried at the assizes.

Mr. Justice J. PARKE.—I do not see any reason why these counts should not be joined. It is like the case of an assault upon a constable being joined with a common assault.

Verdict—Guilty.

Whateley and *Kinnersley*, for the prosecution.

Greaves, for the defendants.

[Attornies—*A. Flint*, and *Jones*.]

In the books it is laid down, that several misdemeanors may be included in the same indictment, "provided the judgment upon each be the same." However, in practice, the latter part of the rule has not been adhered to. A count for an assault with intent to commit a rape is continually put in the same indictment with a count for

a common assault. Counts for conspiracy and false pretences are often to be found in the same indictment; and in the case of *Rex v. Collier*, ante, p. 160, counts for false pretences and forgery at common law were joined in the same indictment, without any objection being made.

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BEFORE MR. JUSTICE TAUNTON.

March 9th.

REX v. JOHN ROBEY.

A prosecutor and his witnesses were bound by recognizance to prosecute and give evidence at the assizes; they attended there and preferred an indictment, which was found. The prisoner had been by mistake discharged by proclamation at an adjourned sessions, which had preceded the assizes, and had absconded. The Judge allowed the expenses; but, *semble*, that if the prosecutor and witnesses had merely appeared at the assizes, and had not preferred any indictment, the Judge would have had no power to allow any expenses.

HOUSEBREAKING. The prisoner had been committed by a magistrate, who had taken the recognizances of the prosecutor and witnesses to prosecute and give evidence at these assizes. By a mistake, the prisoner had been discharged by proclamation at the adjourned sessions which had preceded the assizes. The prosecutor and his witnesses had appeared at the assizes, and had preferred an indictment against the prisoner, which had been returned a true bill by the grand jury.

F. V. Lee applied for the expenses of the prosecutor and witnesses, under sect. 22 of the stat. 7 Geo. 4, c. 64, by which it is enacted, "that the Court before which any person *shall be prosecuted* or tried for any felony," shall be "empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment; and also payment, to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable, and sufficient to reimburse such prosecutor and witnesses for the expenses they shall severally have incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein."

Mr. Justice TAUNTON.—The usual course, where a bill is found and the party is not in custody, is, that no expenses

should be allowed till after the party is taken and brought to his trial (a).

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F. V. Lee.—I am informed, that since his discharge the prisoner is not to be found. Here, the prosecutor has preferred his indictment, and has done all that he could do; and for the discharge of the prisoner he is in no way to blame.

Mr. Justice TAUNTON.—I think that, as the bill has been preferred and found, I may, under the word “prosecuted” in the section you refer to, order the expenses. But, if the witnesses had merely appeared here according to their recognizances, and no bill had been preferred, I think that I should have had no authority.

Expenses allowed.

F. V. Lee, for the prosecution.

[Attorney—*Bagshawe*.]

(a) See the case of *Rex v. Hunter*, ante, Vol. 3, p. 591. 22 to 30, respecting the allowance of expenses and rewards, set forth Carr. Supp. p. 106 *et seq.*
See the stat. 7 Geo. 4, c. 64, ss.

REX v. EVANS.

FALSE pretence. The indictment charged that B. E. on &c., at &c., a certain counterfeit letter in writing, in the name of one John Roe, as a true letter of the proper handwriting of the said John Roe, falsely, fraudulently, and deceitfully, to one John Brooks did deliver, and also did then and there falsely pretend to the said John Brooks, that he had brought the same from the said John Roe for

A person who obtained goods on delivering a forged letter, “Please to let the bearer W.T. have for J. R. four yards of linen,” signed J. R., is not indictable for obtaining goods by false pretence, as this is an ut-

tering a forged request for the delivery of goods, which is a felony under sect. 10 of the stat. 1 Will. 4, c. 66.

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the articles specified therein ; and by which false and counterfeit letter it was mentioned, that the said John Roe desired the said John Brooks to supply the bearer thereof with four yards of Irish linen and a waistcoat ; and which said false and counterfeit letter is as follows, that is to say :—

“ Mr. Brooks—Please to let the bearer, William Turton, have for J. Roe four yards of Irish linen and a waistcoat.

“ Jan. 6, 1833.

“ John Roe.”

By means of which counterfeit letter and of the said false pretences, the said B. E. did obtain &c.

Mr. Justice TAUNTON.—This is a forged request for the delivery of goods. This case comes within the 10th sect. of the stat. 11 Geo. 4 & 1 Will. 4, c. 66 (*a*). It is clearly an uttering of a forged request for the delivery of goods.

W. J. Alexander, for the prosecution.—I submit that it is still a false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53.

Mr. Justice TAUNTON.—No; it is uttering a forged re-

(*a*) By which it is enacted, “ that if any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court roll, or copy of any court roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order,

or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years or less than two years.”

quest for the delivery of goods. It is a felony, and not a misdemeanor. The prisoner must be acquitted.

Verdict—Not guilty.

W. J. Alexander, for the prosecution.

F. V. Lee, for the prisoner.

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REX v. HAUGHTON.

March 15th.

ARSON. The prisoner was charged with setting fire to an “outhouse;” and in another count with setting fire to a “stable,” the property of Joseph Owen. In other counts, the outhouse and stable were stated to be the property of John Sparrow.

It appeared that the place burnt had been an oven to bake bricks, and that the prosecutor had made a door-way (with a door) into it, and had put boards and turf over the vent-hole at the top. It also appeared that two poles had been fixed across it at about half its height, on which boards had been laid, so as to make a loft-floor. In this place, the prosecutor kept a cow; and adjoining to it, but not under the same roof, was a lean-to, in which a person named Cope kept a horse; but this latter building was not injured by the fire.

C. Phillips, for the prisoner.—I submit that this indictment must fail. This was a building for burning bricks, which has latterly been used as a cow-house, but never as a stable. It is not a stable, as it was only used for cows; indeed, the witness calls it a cow-house.

The prosecutor being recalled, said, that the building was about one hundred yards from any dwelling-house, and that the owner of the nearest dwelling-house had no

A building had been built for an oven to bake bricks, but afterwards was roofed, and a door put to it. In this place the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor nor the person of whom he rented this building had any house or farm-yard near it, nor did any wall connect it with any dwelling-house, the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord:—
Held, that the building was neither a stable nor an outhouse; and that if a person set it on fire (the lean-to not being burnt),

he was not indictable for arson.

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interest in it; and that no dwelling-house or farm-yard of either himself or Mr. Sparrow was near it; and that there was no wall to connect it with any dwelling-house.

C. Phillips.—This is not an outhouse.—It is not within the curtilage. The next point is, whether it is a stable.

Mr. Justice TAUNTON.—I think that it is not properly described as a stable.—The question is, whether it is an outhouse?

C. Phillips.—On that point, I would refer to the case of *Elsmore v. St. Briavel's* (a). That case shews, that where a house was built for a particular purpose, but was used for other purposes, it could not be described as a building of the kind that it was used for. There, though the house had been used as a barn, and had never been used for any thing else, yet, being three stories high, and built as a dwelling-house, it was held not sufficient to describe it as a barn. The building, in the present case, was a brick oven, used as a cow-house. I also submit that this is not an outhouse, as it is not attached to any dwelling-house, or within the curtilage of any dwelling-house.

Greaves, on the same side.—I will call your Lordship's attention to the common law, and then to the acts of Parliament, and I think I shall shew that the legal meaning of the term "outhouse" has never been altered. Mr. Serjt. *Russell* (b) says, in treating of the common law respecting the burning of a house—"It may be briefly observed, that the term 'house' extends not only to the dwelling-house, but to all outhouses which are parcel thereof, though not adjoining thereto, or under the same roof (of which kind of outhouses mention has been made in a former part of this work);" and he then refers to the

(a) 8 B. & C. 461; and 2 M. & R. 514. (b) Russ. Cr. & Misd. 488.

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cases of such outhouses within the curtilage, in which, till very recently, a burglary might have been committed. The first act of Parliament which notices outhouses is the riot act, 1 Geo. 1, stat. 2, c. 5, in which the words are, "barn, stable, or other outhouse;" the word "outhouse" is also contained in the stat. 9 Geo. 1, c. 22, with respect to arson: and by *Breeme's* case (a) it appears that that statute created no new offence with respect to the burning of outhouses; and this also appears from the judgment of Lord *Ellenborough*, in the case of *Hyles v. The Hundred of Shrewsbury* (b). I, therefore, submit, that where any term has obtained a precise and definite meaning at common law, and it is used in an act of Parliament, it will be taken to have the same meaning that it had at common law; and for this I would refer to *Bac. Abr.* tit. *Statute* (H. 4), and the cases of *Moore v. Hussey* (c), and *Smith v. Harmon* (d). In the stat. 43 Geo. 3, c. 55, the term "outhouse" is again used; and it is repeated in the stat. 7 & 8 Geo. 4, c. 30. If this were an outhouse, almost every building, of whatever nature and however applied, would be within the statute: and a very strong argument is to be drawn from the statute itself, that outhouses within the curtilage were the only outhouses meant to be included in this term "outhouse;" because, if it were otherwise, the words "stable, coach-house, office, shop, hop-oast, barn, or granary," need not have been used. The question then is, whether this was an outhouse within the meaning of this act of Parliament. It is proved that there was no house near this building; and the term "outhouse" evidently refers to some building that has a relation to the house—a building outside the house, but having a relation to it; and it is clear, that the converting of a building to a particular use does not, for this purpose, alter its nature. That was decided in the case of *Elsmore v. St. Briavel's*, where it was held that a place having been used as a barn,

(a) 2 Russ. Cr. & Misd. 491.

(b) 3 East, 457.

(c) Hob. 97.

(d) 6 Mod. 142.

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did not make it one within the statute then in force respecting arson. There the building was intended as a dwelling-house, but used as a barn. Here, the building was erected for a brick oven, and used as a cow-house.

F. V. Lee, for the prosecution.—The judgment in the case of *Elsmore v. St. Briavel's* does not apply to the present case. The place burnt was not a house, as it never had been inhabited; and no burglary could have been committed in it. It is quite clear that it was not an outhouse, as it was intended to be a place of residence; and it could not be considered as a barn, merely because it had agricultural produce put into it. My friend, Mr. *Greaves*, has said, that whenever a character has been given to a term at common law, it continues. Formerly, a barn within the curtilage might have been the subject of burglary, but that is not so now; therefore, the extent of the term burglary has been altered with respect to buildings in which a capital offence can be committed. At one time a burglary could have been committed in a particular building, and not at another; and that will apply on all occasions where a house is inhabited at one time and not at another. Here, though the place was once a kiln, it was afterwards permanently used in the way in which it was at the time of the fire. The argument would go to this, that a place built for a particular purpose must always continue to have that character; and that certainly cannot be, for, if a barn had doors and windows put into it, and was inhabited, it would become a dwelling-house. I submit, that an outhouse may be at a distance from the dwelling-house, and that it always is so, when a person lives on one farm, and occupies another.

C. Phillips, in reply.—The word 'warehouse' is specifically mentioned, because, if it were not, a warehouse not within the curtilage would not be protected by this act of Parliament; and that is no doubt the reason why the word

warehouse was introduced. A warehouse within the curtilage would be an outhouse.

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Mr. Justice TAUNTON.—I am clearly of opinion, that this is not a case within the act of Parliament. It is true, that the word ‘outhouse’ occurs in the act of Parliament; but, I apprehend that it has been settled from ancient times, that an outhouse must be that which belongs to a dwelling-house, and is in some respects parcel of such dwelling-house. This building is not parcel of any dwelling-house, and does not appear to be connected in any way, either with the premises of Mr. Sparrow, or of the prosecutor. It had been a brick kiln, and the prosecutor kept his cow there afterwards. There is no such word as cow-house in the statute. The only word likely to be applicable in this case is the word outhouse; and this building being wholly unconnected with the dwelling-house, it is not included in the legal definition of outhouse. It is also not a stable; indeed, I do not see that it could be much more properly called a stable than it could be called a coach-house. The prisoner must be acquitted.

Verdict—Not Guilty.

F. V. Lee, for the prosecution.

C. Phillips and *Greaves*, for the prisoner.

[Attornies—*Astbury & Williams*, and *Jones*.]

REX v. HAUGHTON.

March 15th.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 16, for maliciously killing a cow, the property of Joseph Owen. If A. set fire to a cow-house, and burn to death a cow which is in it, A. is indictable under the stat. 7 & 8 Geo. 4, c. 30, s. 16, for killing the cow.

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 ———
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It appeared, that the cow-house mentioned in the last case had been set fire to; and burnt, and that the cow had been burnt to death in it.

Mr. Justice TAUNTON.—If the prisoner set this place on fire while the cow was in it, and the cow was thereby burnt to death, that is a killing of the cow by him within the meaning of the act of Parliament.

Verdict—Guilty.

F.V. Lee, for the prosecution.

C. Phillips and *Greaves*, for the prisoner.

[Attornies—*Astbury & Williams*, and *Jones*.]

By the stat. 7 & 8 Geo. 4, c. 30, s. 16, it is enacted—"That if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four

years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment." See also the case of *Rex v. Hughes*, *ante*, Vol. 2, p. 420. The stat. 4 Geo. 4, c. 54, is repealed by the stat. 7 & 8 Geo. 4, c. 27, except so far as it relates to threatening letters, and to the rescue of offenders.

SHREWSBURY ASSIZES.

(*Civil Side*.)

BEFORE MR. JUSTICE TAUNTON.

—◆—
 JONES v. CLIFF.

A. delivered to B. a pawnbroker's duplicate, for B. to take some goods of A.'s out of pledge. B. did

TROVER for a watch and other articles. Plea—General issue.

It appeared that the plaintiff had pawned these articles so; but, on A. sending to B. for the goods, B. said he had not got them, and refused to tell who had:—*Held*, that if, after this, trover was brought against B., he could insist on a lien on the goods for the money he had advanced to get them out of pledge.

with a person named Drake, a pawnbroker, at Manchester, in the month of September, 1828, and that, in July, 1829, he delivered the duplicate to the defendant to take them out of pledge, which the defendant accordingly did on paying the pawnbroker 11*l.* 17*s.* for principal and interest.

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CLIFF.

It further appeared, that, on the 9th of November, 1832, the plaintiff sent a person named Wycherly to the defendant to demand the articles. This witness said, "I demanded the articles from the defendant, who said that he had not got them, and that he would not tell me where they were. I said, of course Mr. Jones would allow him, *in account*, any sum he might have paid to redeem the goods.

Justice, for the defendant.—I submit that the plaintiff must be nonsuited. The defendant was entitled to hold the goods till he was repaid the sum that he had advanced to redeem them. The plaintiff's witness says that the plaintiff would allow the sum in account. That is not sufficient. The amount ought to have been tendered.

Ludlow, Serjt., for the plaintiff.—No tender was necessary in this case. The defendant does not put it on the ground of lien, and refuse to deliver the goods upon that ground; but he says that he has put it out of his own power to deliver them up, and refuses to tell where they are (a).

Justice.—The plaintiff was in no condition to ask the return of the goods till he made a tender of the money; and it therefore signified nothing where the goods were.

Mr. Justice TAUNTON.—I certainly shall not nonsuit.

(a) See the case of *Ayling v. Williams*, ante, p. 399.

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Mr. *Justice*, if you have any evidence to offer, I will hear it.

Justice, for the defendant, opened that the pawnbroker's duplicate was put into the defendant's hands, that he might repay himself a balance that the plaintiff owed him; and, to substantiate this defence, a letter from the plaintiff to the defendant was put in.

Mr. Justice TAUNTON left it to the jury to say whether there was any agreement between the parties to the effect suggested on the part of the defendant.

Verdict for the plaintiff.

Ludlow, Serjt., and *Whateley*, for the plaintiff.

Justice, for the defendant.

[Attornies—*J. Burns*, and *Burges*.]

COURT OF EXCHEQUER.

(*In Bank*.)

BEFORE LORD LYNTHURST, C. B., MR. BARON BAYLEY, AND
MR. BARON VAUGHAN.

April 18th.

Justice moved for a rule to shew cause why there should not be a new trial, on the ground that the defendant had a right to hold the goods, as there had been no tender of the money advanced; and also on the ground that the verdict was against evidence.

LORD LYNTHURST, C. B.—As the defendant said that he had given over the possession of the goods, and would not tell to whom, he could not insist on a formal tender. A party can only be obliged to make a tender

when, by tendering, he would get possession of the goods.

BAYLEY, B., and VAUGHAN, B., concurred.

Rule refused.

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DOE on the demise of ALLEN v. BLAKEWAY.

EJECTMENT. The lessor of the plaintiff claimed as the heir at law of William Allen, deceased. It appeared that Richard Park, who was tenant for life of the premises in question, with a general power of appointment by will attested by three credible witnesses, by his will attested by three witnesses devised to Martha Allen for her life, and after her death to William Allen in fee. Martha Allen was one of the attesting witnesses to the will. On the death of the testator, in 1805, the husband of Martha Allen entered and retained possession of the premises till his death in the year 1831. Martha Allen died in the year 1828, and William Allen in the year 1832, he having attained his full age of 21 years in the year 1815. The present ejectment was commenced in Hilary Term, 1833.

A. was tenant for life, with a power of appointment by will, attested by three credible witnesses. By will, attested by three witnesses, he appointed the lands to B. for life, and after her death to C. in fee. B. was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B. entered, and held the land till his death, which was three years after the death of B.:—
Held, that the

Maule, for the defendant, submitted that, as the devise to Martha Allen was void by the stat 25 Geo. 2, c. 6, s. 1 (a),

statute of limitations did not begin to run against C. till the death of B.

(a) By which it is enacted,
“That if any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, in the year of our Lord 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal

estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or co-

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the title of William Allen accrued immediately on the death of the testator; and that, as ten years had elapsed since he came of age, and before the present ejectment was brought, his entry was barred by the statute of limitations, 21 Jac.1, c. 16.

Mr. Justice TAUNTON.—I am of opinion that the right of William Allen must be taken for this purpose not to have accrued till the death of Martha Allen, notwithstanding the life estate was bad. William Allen's estate is, by the terms of the will, to commence after the death of Martha Allen. It is analogous to the case of a remainder-man, where there has been a forfeiture of the life estate; he is not bound to insist on the forfeiture, but may wait the regular expiration of the particular estate; and the statute of limitations does not begin to run till that time. The lessor of the plaintiff is entitled to recover.

Verdict for the plaintiff.

Talfourd, Serjt., and *R. V. Richards*, for the lessor of the plaintiff.

Maule and *Whateley*, for the defendant.

[Attornies—*How*, and *Watson*.]

dicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil, within the in-

tent of the said act, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil."

1833.

March 28th.

REX v. WILLIAM HANDLEY and JOHN HANDLEY.

THE prisoners were indicted under the stat. 9 Geo. 4, c. 31, ss. 11 & 12, for shooting at John Bannock, the game-keeper of Mr. Eyston. They were also indicted, under the stat. 9 Geo. 4, c. 69, s. 9, for night poaching on the land of Mr. Eyston.

Godson, for the prisoners, submitted that, as the two indictments were in reality founded on the same identical transaction, the prosecutor ought to be put to elect which he would proceed upon, and abandon the other.

Mr. Justice J. PARKE.—These are quite distinct offences, and the one cannot by possibility merge in the other. I think, therefore, that the prosecutor is not bound to abandon either.

The indictment for the shooting was tried, and the prisoner Willam Handley was convicted, and the prisoner John Handley acquitted (a).

Bather and *Corbett*, for the prosecution.

Godson, for the prisoners.

[Attornies—*Duke & Salt*, and *Asterley*.]

(a) The prisoner John Handley was discharged without being tried on the indictment for night poaching; the learned Judge ob-

serving, that, by the conviction of the other prisoner, the ends of justice would be attained.

A. was indicted for shooting at B., a game-keeper. There being another indictment against A. for night poaching:—*Held*, that although both indictments related to the same transaction, yet the offences were quite distinct from each other; and that the prosecutor, therefore, ought not to be put to his election to go upon one indictment and abandon the other.

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HEREFORD ASSIZES.

BEFORE MR. JUSTICE J. PARKE.

March 22nd.

WILLIAMS v. CARWARDINE.

A. published a handbill, offering a reward to any person who would give such information as would lead to the discovery of the murderers of B. C., knowing of this handbill, gave the information:—

Held, that C. was entitled to the reward, although it was found by the jury that C. did not give the information in consequence of the offered reward, but from other motives.

Held, also, that the first person who gives the information is entitled to the reward, and the motive of such person in giving the information is not material.

If two persons go together to give the information, they must bring a joint action for the reward.

ASSUMPSIT. The first count of the declaration stated in substance, that the defendant had caused to be published a placard or advertisement, reciting, that Walter Carwardine had been robbed, and that there was great reason to suppose that he had been murdered; and that by this placard the defendant did “promise and undertake, that whosoever would give such information as might lead to a discovery of the murder of the said Walter Carwardine, should, on conviction, receive a reward of 20*l.*; and that any person concerned therein, or privy thereto, except the person who actually committed the offence, should be entitled to such reward, and every exertion used to procure a pardon;” and that, by the said placard or advertisement, the defendant “directed that the said information should be given, and application for the above reward be made to him, or Mr. Watkins, solicitor, Hereford.” The plaintiff then averred, that she, “confiding in the said promise of the said defendant,” and not being the party who actually committed the offence, “did give to the said defendant such information as led to the discovery of the murder of the said Walter Carwardine;” and that, afterwards, at the Hereford Assizes, held on the 20th day of March, 1832, Joseph Pugh, John Matthews, and William Williams, who were guilty of the said offence, to wit, the murder of the said Walter Carwardine, were in due manner convicted of the said murder, “in consequence of such information so given by the said plaintiff as aforesaid.” This count went on to state, that of all this the defendant had notice, and that he became liable to pay the plaintiff 20*l.*, which, although requested by the plaintiff, he had not paid her.

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The *second* count was similar, except that it omitted to state to whom information was to be given; and did not aver that the information was given by the plaintiff to the defendant; nor that Pugh, Matthews, and Williams, were guilty of the murder; nor that they were convicted in consequence of the information given by the plaintiff. The *third* count was similar to the first, except that it omitted the clause respecting the procuring of a pardon for an accomplice, and that it did not aver that the plaintiff was not the person who committed the offence; and that it did not state that J. P., J. M., and W. W. were convicted in consequence of the information given by the plaintiff. The *fourth* count was similar to the second, omitting that part which related to the procuring a pardon for an accomplice, and the averment that the plaintiff had not committed the offence.

The *fifth* count stated, that before the making of the promises in that and the two next counts mentioned, the body of Walter Carwardine had been found in the river Wye, with marks of violence on his person, so as to give reason to believe that he had been murdered; and that, for the better apprehending and bringing to justice the person or persons concerned in the murder, the defendant "promised that whoever, except the party who actually committed the offence, would give such information as would lead to a discovery of the murder of the said Walter Carwardine, should, on conviction, receive a reward of 20*l*. The plaintiff then averred, that she, not being the party who actually committed the offence, "did give such information as led to the discovery of the murder of the said Walter Carwardine;" and that, at the Hereford Assizes, on the 20th March, 1832, J. P., J. M., and W. W., were convicted of the murder; of all which the defendant had notice, whereby he became liable to pay the plaintiff 20*l*., but had refused to do so.

The *sixth* count was similar, omitting the exception of the person who actually committed the offence, and the

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averment, that the plaintiff had not committed it. The *seventh* count stated, that, in consideration that the plaintiff had given such information as had led to a discovery of the murder, the defendant promised, that, "on conviction he would pay her the sum of 20*l*." It then stated the conviction of J. P., J. M., and W. W., as in the former counts. The *eighth* count was for work and labour; money paid, money had and received, and on an account stated. Plea—General issue.

On the part of the plaintiff it appeared, that the brother of the defendant had been murdered at Hereford on the 24th of March, 1831, and that his body was found in the river Wye, on the 12th of April; and that, on the 25th of April, the defendant caused the following handbill to be published:—

"Ten pounds reward and twenty pounds reward. Whereas, Walter Carwardine, late of Broxwood, in the county of Hereford, farmer, was, on the night of the 24th of March last, or early on the following morning, robbed of a 5*l*. Kington and Radnorshire bank note, at a house of ill fame in Quaker's Lane, in the city of Hereford; and the body of the said Walter Carwardine was found in the river Wye on the 12th day of April instant; with marks of violence on his person, and there is great reason to believe that he was murdered. And whereas Sarah Coley, late of the city of Worcester, single woman, is charged on oath with having committed such robbery, and being privy to or concerned in such murder, whoever will apprehend the said Sarah Coley, and lodge her in any one of his Majesty's gaols, shall receive a reward of 10*l*.; and whoever will give such information as may lead to a discovery of the murder of the said Walter Carwardine, shall, on conviction, receive a reward of 20*l*.; and any person concerned therein, or privy thereto, (except the party who actually committed the offence), shall be entitled to such reward, and every exertion used to procure a

pardon. [Here followed a description of Sarah Coley.] Information to be given, and application for the above reward to be made, to Mr. William Carwardine, Holmer, near Hereford, or to Mr. Watkyns, solicitor, Hereford.

“ Hereford, April 25, 1831.”

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It further appeared, that, at the Hereford Summer Assizes of 1831, two persons, named Pugh and Connop, were tried for the murder, and acquitted, the plaintiff having been examined as a witness against them; and that, shortly after that time, the plaintiff having been dreadfully beaten by William Williams, and thinking herself not likely to recover from the violence she received, she made a disclosure to Mr. Howells, the swordbearer of the city of Hereford, in consequence of which, she, on the 23rd of August, made the following deposition before Mr. Milton, a magistrate—“ The voluntary statement of Mary Anne Williams, made this 23rd day of August, 1831, before me, one of his Majesty’s justices of the peace in and for the said city, who, on her oath saith, that, in consequence of her miserable and unhappy situation, and believing that she has not long to live, she makes this voluntary statement to ease her conscience, and in hopes of forgiveness hereafter. That, on Thursday night in the assize week, in the month of March last, between the hours of eleven and twelve o’clock, I went into Joseph Pugh’s house, in Quaker’s Lane, and there saw Susan Connop, Sarah Coley, Susan Reignart, Mr. Webb, the butcher, and Walter Carwardine. After drinking with them, I left the house with Mr. Webb. I walked as far as the King’s Head Inn, in Broad Street; I returned by the way of Eign Street to the end of Quaker’s Lane, by Eign Gate Turnpike. I went along the lane as far as the gate of Mr. Thomas the coachmaker’s meadow opposite to the Cross Lane, where I heard a noise. I there saw Joseph Pugh, William Williams, a man of the name of Matthews, and Sarah Coley. I heard Mr. Carwardine’s voice very plain. He said,

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‘ For God’s sake do not murder me.’ I heard Coley say, ‘ I have got his blunt, and if you will keep secret I’ll treat.’ Williams said, ‘ We will soon put him out of the way.’ I then heard a dreadful blow, and Mr. Carwardine fell on the ground on his back. I distinctly heard two long deep groans, as if he was dying. I did not hear him speak. After a moment Williams saw me, he ran to me, and forced me into the turnpike road, near Eign Gate; Williams ran back along the lane to the Cross Lane; I went along the turnpike road to the Red Lion Inn, turned up Townditch Lane into the Cross Lane, but no one was there. I went into Quaker’s Lane, by the end of the barn, and listened. I heard Pugh, Williams, Matthews, and Coley, about Mr. Thomas’s house, the carpenter, three parts down the lane, towards the tan yard, I distinctly heard Pugh curse his eyes, and say, ‘ Go on.’ Coley said, ‘ Don’t talk so loud; don’t be in a hurry.’ I was very much frightened, and I got into the house, and went to bed.

“ (Signed) Mary Anne Williams.

“ Sworn before me,
 William Milton.”

The record of the conviction of William Williams, Joseph Pugh, and John Matthews, was put in; and it was admitted that there had been a demand of the reward on the behalf of the plaintiff.

Curwood, for the defendant.—It is clear, that any person, who, in consequence of this handbill, fairly gave evidence that led to the discovery of the murderers, would be entitled to the reward; but, in this case, it is manifest that the disclosure was made from other motives. Shortly after the finding of the body of the deceased there was an inquest, and after that Pugh and Connop were tried; and, previous to that trial, the plaintiff made a deposition, which was totally unlike what she stated in her second deposition, which has been read. After the first trial, she

was severely beaten by Williams, and, being apprehensive of death, she made a disclosure. Does she do this in consequence of the handbill? No. From other and quite different motives. The handbill is published in April, and she makes the disclosure in August. If it was not the handbill, but other circumstances, which operated on her mind, there is no contract between these parties: indeed, her second deposition was of so little value that the magistrate would not act upon it, not only on account of her previous character, but on account of her having before made a different statement. The declaration states, that she, confiding in the promise contained in the handbill, made a disclosure. This is, I submit, a case of what in the civil law is called *policitation*, that is, an offer by one party not accepted by the other.

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Mr. Justice J. PARKE.—Have you any authority for your position as to the motive? The terms of the handbill are, that “Whoever will give such information as may lead to a discovery,” is, on conviction, to receive the reward. If this information had not been given, these men would not have been convicted.

The first deposition made by the plaintiff, on the 19th of April, 1831, was put in: it was as follows—“Mary Anne Williams states, that, on Thursday night in the assize week, between half-past ten and eleven o’clock, she went into Joseph Pugh’s house in Quaker’s Lane; when she went in she saw Susan Connop, a tall girl, a little girl, a lusty man sitting in a great chair, and Mr. Webb, the butcher. They were drinking spirits; witness staid there half an hour, and left there the persons whom she has described. She went into the town; as she came back she saw the same man that she has described as the lusty man, standing at the corner of Mr. Thomas the coachmaker’s building. A gentleman went by, and spoke to this man, and said, ‘Why, Mr. Carwardine, what brings you there?’

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He said, in answer, 'Why, how the devil do you know my name?' The gentleman answered, 'Oh, I know you very well.' This was very near twelve o'clock; witness does not think it had struck twelve."

. Mr. Howells, in answer to a question put by the learned Judge, said, that the second deposition of the plaintiff was the material information that led to the discovery of the murderers; but he also stated that the plaintiff did not attend the inquest; and that the magistrate declined granting any warrant upon her statement, unless some other person was brought to confirm it; and that a person, named Elizabeth Powell, was sent for, and she confirmed the statement in many respects.

Ludlow, Serjt., *amicus curiæ*.—In a case tried before Lord Chief Justice *Gibbs*, at Bristol, which was an action for a reward, his Lordship laid down, that, either the person claiming the reward must shew a title to it in himself alone, or all who are concerned in making the disclosure must join in bringing the action.

Talfourd, Serjt., for the plaintiff.—My client gives the information, and a conviction follows. If the case went to the full extent of the doctrine stated by Mr. Serjt. *Ludlow*, no one could recover unless he or she were the only witness examined. I submit that the plaintiff was the sole moving cause; and that the person who gives the first information, is the one who leads to a discovery.

Mr. Justice J. PARKE.—The person who makes the first disclosure is certainly the person who leads to a discovery; for, if she had said nothing, no discovery would have been made.

Talfourd, Serjt.—If the plaintiff had herself known nothing, but had said A. B. knows all about it, and that had led to a discovery, it would have been sufficient.

Mr. Justice J. PARKE.—There is only one reward to be paid. If two persons had come together to give the information, the action must have been joint; but, as the plaintiff alone gave the first information, she alone is entitled to the reward.

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CARWARDINE.

Curwood.—There is then the question of motive. In the declaration it is averred, that the plaintiff, “confiding” in the promise, gave certain information, which is alleging that as the motive.

Talfourd, Serjt.—That is mere form of pleading, the same as the words “fraudulently contriving and intending.”

Mr. Justice J. PARKE.—If the plaintiff comes within the conditions of the handbill, I think she is entitled to the reward. The jury will probably find that the 20*l.* was not the motive. We may, I think, assume that it was not. The motive was the state of her own feelings. My opinion is, that the motive is not material; and that, if she comes within the terms of the handbill, that is sufficient.

Curwood.—Will your Lordship give me leave to move to enter a nonsuit?

Mr. Justice J. PARKE.—Yes; I will give you leave to move. It is to be taken as found by the jury, that the plaintiff gave the information which led to the discovery of the murderers; but that she did not give that information for the sake of the 20*l.* reward, nor in consequence of the handbill, but from stings of conscience.

Verdict for the plaintiff—Damages 20*l.*

Talfourd, Serjt., and *Godson*, for the plaintiff.

Curwood and *C. Phillips*, for the defendant.

[Attornies—*Ball*, and *Watkyns*.]

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COURT OF KING'S BENCH.

[*In Bank.*]

BEFORE DENMAN, C. J., LITLEDALE, J. PARKE, AND
PATTESON, JS.

April 18th.

Curwood moved for a rule to shew cause why a non-suit should not be entered, on the ground that the plaintiff was not a meritorious informer; and that she sued on a contract which had in effect been negatived by the finding of the jury.

DENMAN, C. J.—Was any doubt suggested as to whether the plaintiff knew of the handbill at the time of her making the disclosure?

Curwood.—She must have known of it, as it was placarded all over Hereford, the place at which she lived.

Mr. Justice J. PARKE.—I take this to have been a contract with any one who did the thing.

Mr. Justice LITLEDALE.—If the person knows of the handbill and does the thing, that is quite enough. It does not say, whoever will come forward in consequence of this handbill.

DENMAN, C. J.—As the plaintiff is within the terms of the handbill, she is entitled to the reward.

Mr. Justice PATTESON.—The plaintiff being within the terms, her motive is not material.

Rule refused.

In the case of *Fallick v. Barber*, 1 M. & S. 108, where an advertisement respecting a stolen child promised a reward to the person who would give information where the child was, so as that it might be restored to its parents, and the plaintiff communicated to the de-

fendant her suspicion where the child was, in order to put the matter into his hands *for his benefit, if he chose to run the risk*, and the child was afterwards restored to its parents by the exertions of the defendant acting on the plaintiff's communication:—*Held*, that the plaintiff could not recover from the defendant to whom the reward had been paid, either the whole or any portion of it. In the case of — *v. Ernst*, 3 Went. Plead. 30, a party by handbill offered that “whoever would apprehend N. K., or give such information to S. W.

as might be the means of his being apprehended, should receive a reward of fifty guineas.” The plaintiff gave the information to S. W., but the defendants refused to pay the reward to the plaintiff, because they had paid it to the person who had apprehended N. K., and they relied on this as an answer to the plaintiff's claim; but Lord *Kenyon* held, that the plaintiff was entitled to recover, and that both the plaintiff and the person who apprehended N. K. were entitled to a reward of fifty guineas.

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WILLIAMS
v.
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DOE on the demise of STANSBURY v. ARKWRIGHT.

March 22nd.

EJECTMENT for a wood and certain lands at Leominster.

The lessor of the plaintiff claimed as tenant in tail, under the will of Thomas Stansbury, the brother of his great grandfather.

It appeared that the plaintiff's grandfather, Joseph Stansbury, in the year 1768, went to reside in Pennsylvania, which was then a British colony, and that he there continued till the year 1773, when he came to this country; but that he returned to Pennsylvania in the following year. It further appeared, that he came again to England in 1783, to claim a compensation from the British Government for losses as an American loyalist.

A person's being assessed to the land-tax for certain lands, is not evidence of his seisin of those lands.

If a person is seen felling timber in a wood, it is *prima facie* evidence that he is the owner of it; and therefore, any thing that he says at that or any other time as to any one else being the owner of it, is evidence.

A. resided in Pennsylvania before the declaration of American independence.

and he had a son B., born there also before that period. In 1783, A. came to England to get compensation for his losses as an American loyalist. In 1785, he returned to Pennsylvania, where he died. B. never was in England. *Seemle*, that both A. and B. were American subjects; and that A. became so, by returning to Pennsylvania in 1785; and that a claim to lands could only (if at all), be made through them, under the stat. 37 Geo. 3, c. 97, s. 24.

What A. said in England, as to why he came, is evidence.

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DOE
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Stansbury had told the witness as to the reason of his coming to England, was not evidence.

Mr. Justice J. PARKE.—He comes to England, and says why he does so. I cannot exclude that. It is evidence in the same way, that, in proving an act of bankruptcy, we hear what the person says to explain his acts.

It appeared, that, in the year 1785, Joseph Stansbury again returned to America, and there remained to the time of his death. The father of the plaintiff was born in Pennsylvania in the year 1772, and resided there to the time of his death.

Talfourd, Serjt., for the lessor of the plaintiff, submitted, that the father and grandfather of the lessors of the plaintiff, or at least the latter, were to be considered as British subjects; and he cited the cases of *Auchmuty v. Mulcaster* (a), *Doe d. Thomas v. Acklam* (b), and *Sutton v. Sutton* (c), and he further argued, that, if that were not so, the lessor of the plaintiff would be entitled to recover under the provisions of the statute 37 Geo. 3, c. 97, ss. 24, 25 (a).

(a) 8 D. & R. 593. In that case it was held, that the children of an American loyalist, who continued his allegiance to the crown of Great Britain after the colonies were separated from the mother country, and settled in America, were entitled to take lands by descent in England within the operation of the stat. 4 Geo. 2, c. 21, as natural born subjects of the crown of Great Britain.

(b) 4 D. & R. 394. In that case it was held, that a person born in the United States of America since the treaty of 1783, by which those states were acknowledged by this country to be free, sovereign, and

independent, is an alien, and cannot take lands by descent in England.

(c) 1 Russ. & Mylne, 663. In that case it was held, that, under the treaty of 1794, between Great Britain and America, and the stat. 37 Geo. 3, c. 97, American citizens who held lands in Great Britain on the 28th of October, 1795, and their heirs and assigns, are at all times to be considered, so far as regards those lands, not as aliens, but as native subjects of Great Britain.

(a) By s. 24, after reciting that whereas by the 9th article of the treaty between Great Britain and

The declaration of the independence of the United States of America was in the year 1778, and the treaty between the United States and this country was in the year 1783.

The lessor of the plaintiff had been naturalized by a private act of Parliament passed in the year 1827, and by this he was empowered by express words to take lands, either by descent or purchase.

To prove that Thomas Stansbury was seised of the wood, a witness was called, who stated that he saw a man named Brown, who was since dead, felling timber there.

Busby, for the lessor of the plaintiff, wished to ask what Brown had said as to who was the owner of the wood.

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the United States of America, 'it was agreed that British subjects who then held lands in the territories of the said United States, and American citizens, who then held lands in the dominions of his Majesty, should continue to hold them according to the nature and tenure of their respective states and titles therein, and might grant, sell, or devise the same to whom they should please, in like manner as if they were natives, and that neither they nor their heirs or assigns should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens;' it is enacted, "that all lands, tenements, and hereditaments, in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which, on the said twenty-eighth day of October, one thousand seven hundred and ninety-five (being the day of the exchange of the ratification of the said treaty between his Majesty and the said United

States), were held by American citizens, shall be held and enjoyed, granted, sold, and devised, according to the stipulations and agreements contained in the said article; any law, custom, or usage to the contrary notwithstanding."

By sect. 25 it is provided, "That nothing herein contained shall extend, or be construed to extend, to give any right, title, or privilege to any person, not being a natural-born subject of this realm, which such person would not have been entitled to if this act had not been made, other than and except such rights, titles, and privileges as shall be necessary for the true and faithful performance of the stipulations in the said article contained, according to the true intent and meaning thereof, or to give to any person, not being either a natural-born subject of this realm, or a citizen of the said United States, any right, title, or privilege, to which such person would not have been entitled if this act had not been made."

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Maule, for the defendant, objected.

Mr. Justice J. PARKE.—He exercised an act of ownership, and he is, therefore, *prima facie* owner. And what he says as to any one else being the owner, is a declaration to cut down his own title.

Maule.—He was a mere workman.

Mr. Justice J. PARKE.—I do not know that he was only a workman, except from what he may have said.

R. V. Richards.—Your Lordship will only hear what he said at the time.

Mr. Justice J. PARKE.—Yes; what he said at any time.

The question was put; but it did not appear that Brown had ever stated whose the wood was.

To prove a seisin of the whole of the property in Thomas Stansbury, the duplicate land-tax assessments were produced by the clerk of the peace; and by these it appeared that Thomas Stansbury was assessed to the land-tax; and that the name of the defendant in the subsequent land-tax assessments had been substituted for that of Thomas Stansbury.

Mr. Justice J. PARKE.—I do not think these assessments are evidence of seisin. However, I will leave them to the jury to take into their consideration; and, if they find the seisin, which I expect they will, I shall nonsuit the plaintiff, with leave to move to enter a verdict, if the Court shall think there was any evidence of seisin to go to the jury.

The jury found the seisin, and the plaintiff was nonsuited, with leave to move to enter a verdict.

Mr. Justice J. PARKE.—I should say upon this evidence, that the lessor of the plaintiff's father and grandfather were American subjects (*a*); and, that the latter became American when he went back in the year 1785; and then the case would turn on the stat. 37 Geo. 3, c. 97.

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Talfourd, Serjt., and *Busby*, for the lessor of the plaintiff.

Maule and *R. V. Richards*, for the defendant.

[Attornies—*Day & Fowler*, and *Austin & Co.*]

IN the ensuing term, *Talfourd*, Serjt., moved to set aside the nonsuit in pursuance of the leave given; but the Court of King's Bench refused a rule, being of opinion that the duplicate land-tax assessments were not evidence of the seisin of Thomas Stansbury.

(*a*) By the stat. 7 Ann. c. 5, 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, all children born out of the King's ligeance, whose fathers or grandfathers by the father's side were natural born subjects, are to be deemed natural born subjects themselves, unless their said ancestors were attainted or banished beyond sea for high treason, or were at the time of the births of

such children in the service of a prince at enmity with Great Britain. But the grandchildren of such ancestors are not to be privileged in respect of the alien's duty, unless they be within the realm, and take an oath, &c., nor are they enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

REX v. The Inhabitants of St. WEONARD'S.

March 23rd.

INDICTMENT for the non-repair of a highway. The indictment stated it to be a highway for horses, coaches, carts, and other carriages.

A road had been repaired by a parish, and persons on horseback had used it, but there was no evidence that

any carriage had ever gone along the whole length of it:—*Held*, that the parish could not be convicted of non-repair of it on an indictment stating it to be a highway for carriages; and that there should have been a count in the indictment charging it to be a way for horses.

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It appeared that the road had been repaired by the parish of St. Weonard's, and that persons on horseback had frequently passed all along it; but there was no evidence that any carriage had ever gone along the whole length of it, although there was evidence that carts had been seen at one end of it, which would lead them also to a farm-house which was near to that end.

Mr. Justice J. PARKE.—There is no count charging this as a bridle road. The evidence of repair would shew it to be a parish road, but that might be for horses only. There is no evidence of a carriage ever having gone all along it; and, as to the carts, they might be merely going to the farm.

Ludlow, Serjt., for the prosecution.—Does not your Lordship think, that, upon this indictment, the defendants may be convicted if it was a road for horses?

Mr. Justice J. PARKE.—Not without a count charging that it was a road for horses. The defendants must be acquitted.

Verdict—Not guilty.

Ludlow, Serjt., and *Justice*, for the prosecution.

R. V. Richards and *Burmester*, for the defendants.

[Attornies—*Cooke*, and *Collins*.]

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MONMOUTH ASSIZES.

BEFORE MR. JUSTICE TAUNTON.

PROTHEROE v. MATHEWS.

March 26th.

TRESPASS, for shooting a dog (*a*). Pleas—*First*, general issue. The *second* plea stated in substance, that Sir Charles Morgan was possessed of an ancient park, and that the dog was hunting and chasing divers deer in that park, and that the defendant, as the servant of Sir Charles Morgan, and by his command, “for the preservation of the said deer, and to prevent the said dog from continuing to hunt and chase the same respectively,” shot the dog. The *third* plea stated a grant of park and free warren by King James the First in the *locus in quo*; that there were deer there; and that the dog was on the land, hunting and chasing them (*b*). The *fourth* plea was shot, if the chasing of the deer and the shooting the dog, were all one and the same transaction.

The servant of the owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing deer at the moment when it was

(*a*) The first count of the declaration was for shooting and wounding a dog called a setter, and another dog. The second count was for stabbing a pointer, a setter, and another dog. The third for killing three dogs. The fourth, for taking and seizing three dogs, and converting them to the defendant's use. The pleadings were therefore all framed as if there had been more than one dog injured, which was not the fact.

(*b*) As the form of this plea may be useful to the profession, we have subjoined it. “And for a further plea as to the said supposed trespasses in the introduc-

tory part of the said second plea mentioned, and in that plea justified, the said defendant by like leave of the Court first had and obtained, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that, at the respective times of committing the said supposed trespasses in the introductory part of this plea referred to, the said dogs in the said first and third counts respectively mentioned were in and upon certain lands in the county aforesaid; and that the said Sir Charles Morgan, Bart., long before any of the said times when &c. in the first and third counts

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similar to the second, except that it stated the park to have been a "lawful park," instead of an ancient park.

mentioned, and at those times respectively, was, and from thence hitherto hath been and still is lawfully possessed of the said lands, with the liberties, franchises, and appurtenances thereto belonging, or in anywise appertaining; and the said defendant saith, that, long before any of the said times when &c., and before the said Sir C. Morgan was possessed of the said lands, or had any estate or interest therein, and at the time of the making and sealing of the letters patent hereinafter mentioned, to wit, on the 1st day of December, in the 14th year of the reign of his Majesty, King James the First, formerly King of England, one Sir William Morgan, Knight, was seised in his demesne as of fee of and in the said lands; and that, before any of the said times when &c. in the said first and third counts mentioned, to wit, on the day and year last aforesaid, his said Majesty, King James the First, by his letters patent, sealed with the great seal of England, and duly enrolled, and now remaining of record in his Majesty's High Court of Chancery, (an exemplification of the enrolment thereof, sealed with the great seal of England, the defendant brings here into Court, according to the form of the statute in such case made and provided), of his special grace, certain knowledge, and mere notion, did grant for himself, his heirs and successors, unto the said Sir William Morgan, Knight, his heirs and as-

signs, and every of them, that he the said Sir William Morgan, Knight, his heirs and assigns, and every of them, should for ever have free warren in the said lands; and his said Majesty, James the First, did, by his said letters patent, further give and grant for himself, his heirs and successors, unto the said Sir William Morgan, Knight, his heirs and assigns, his said late Majesty's full, free, and entire license, power, and authority from time to time for ever, and at his and their pleasure, to make a park and parks, warren and warrens, with ditches, hedges, walls, pales, or in any other manner to have, hold, and enjoy the same park or parks, warren or warrens, so made and inclosed, or to be made and inclosed, and in every or any of these the liberties, rights, franchises, prerogatives, property, and benefit of a park and free warren. And his said late Majesty did further give and grant for himself, his heirs and successors, unto the said Sir William Morgan, Knight, his heirs and assigns, full, free, and entire liberty, license, power, and authority from time to time, at his and their will and pleasure for ever, to replenish, have, and keep, all and singular the said manors and lands, or any part or parcel thereof, as well inclosed or not inclosed, with stags, bucks, does, hares, conies, pheasants, partridges, and all other beasts and birds soever, being of a wild nature; and that he the said Sir William Morgan, Knight, his heirs and as-

The *fifth* plea stated the *locus in quo* to be the close of Sir Charles Morgan, and that the dog was chasing the

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signs, should and might for ever thereafter have, hold, and enjoy within the said lands and every of them the liberties, rights, privileges, property, and benefit of a park and parks, free warren and warrens. And his said late Majesty did, by his said letters patent, further order and command, that no person should enter or presume to enter into the said park or parks, free warren or free warrens, or any of them, to shoot, hunt, hawk, chase, or in any manner to disturb or take any thing there that did, might, or ought to belong to the said park or parks, warren or warrens, nor do or commit any thing within the same park or parks, warren or warrens, that could or might be to the damage, hurt, or prejudice of the same park or parks, warren or warrens, or the liberties, rights, or privileges of the same, or any part of them, without the will and license of the said Sir William Morgan, Knight, his heirs or assigns, under the penalties in the statutes and ordinances of the kingdom of England made and provided for the preserving and keeping of parks and warrens: which said letters patent, before and at the times when &c., were and are still in full force, vigour, and effect, as by the said record thereof enrolled and now remaining in the said Court of Chancery will more fully appear. And the said defendant further saith, that the said Sir Charles Morgan, before and at the said several times when &c., had cer-

tain stags, bucks, and does, in and upon the said lands; and that the said dogs in the said first and third counts respectively mentioned, at the said times when &c. in those counts respectively mentioned, were in and upon the said lands, hunting and chasing certain stags, bucks, and does of the said Sir Charles Morgan therein, wherefore the said defendant, for the preservation of the said stags, bucks, and does of the said Sir Charles Morgan, and to hinder and prevent the said dogs from further hunting and chasing the same respectively, as the servant of the said Sir Charles Morgan, and by his command, did, at the said time when &c. in the said first count mentioned, shoot off and discharge the said gun in the said first count mentioned, so loaded as in that count mentioned, and did then and there shoot at and against the said dogs in the said first count mentioned, on the said lands, and did then and there hurt and wound the said dogs, as in the said first count mentioned, and did, at the said time when &c. in the said third count mentioned, shoot, kill, and destroy the said dogs in the said third count mentioned, on the said lands, as he lawfully might for the cause aforesaid, which are the said trespasses in the introductory part of this plea mentioned and referred to; and this he the said defendant is ready to verify; wherefore he prays judgment," &c.

In 3 Lev. 26, there is the form of a plea of justification, for shoot-

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deer, and because the dog "could not otherwise be restrained or hindered from running after, chasing, hunting, and killing the said deer, and would otherwise have killed the same respectively," the defendant, as the servant, &c., shot the dog. Replication, protesting that the *locus* was a park, protesting the grant of King James the First, and protesting the command, with *de injuriâ* as to the residue.

It appeared, that a tram-road for coal waggons, ran through the park of Sir Charles Morgan, and was not in any way fenced off from the park; this tram-road being also used as a footway. It further appeared that the dog of the plaintiff had followed three young women who were walking along this road; and had then run off the road and chased the deer, and having done so returned to the women in the tram-road, and lay down; this being within twenty yards of the gate by which the women were going to leave the park; while the dog was in this situation, the defendant, who was a servant of Sir Charles Morgan, shot it. It was proved that a person named Potter had told one of the women to take care of the dog, or he would be shot; and that boards were fixed up about the park, stating that dogs found in the park would be shot.

Maule, for the plaintiff, cited the case of *Vere v. Lord Cawdor* (a), and submitted that the defendant could not

ing a dog in a chase, where the dog had hunted a deer and killed it; and in 9 Wentw. Plead. 66, is a plea by the bow bearer of a forest, justifying the killing of a dog that was chasing a hare there, and a very special replication thereto; and in Richardson's "Practice of the Common Pleas," p. 484, is a justification of the shooting of a greyhound, that was accustomed to frequent a

park and hunt there.

(a) 11 East, 568. In that case it was held, that a plea to an action of trespass for killing the plaintiff's dog, cannot justify the act, by stating that the lord of a manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, for the preservation of the hares; such plea not stating that it was

justify the shooting of the dog, unless it was absolutely necessary for the preservation of the deer.

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Mr. Justice TAUNTON.—That case is very distinguishable from the present. There are the cases of *Wadhurst v. Damme* (a), and *Barrington v. Turner* (b).

necessary to kill the dog for the preservation of the hares, and not stating that it was the dog of an unqualified person.

(a) Cro. Jac. 44. In an action for killing a mastiff, the defendant pleaded, that Sir F. W. was seised of a warren, of which the defendant was warrener, and that the dog was divers times killing conies there, and that finding him there *tempore quo*, therefore he shot him. The Court held the justification good, "because, it being alleged that the dog used to be there killing conies, it is good cause for the killing him in the salvation of the conies; for, having used to haunt the warren, he cannot otherwise be restrained," But *Yelverton, J.*, doubted, as it was not alleged that the master was *sciens* of the quality, or had warning given him thereof. However, *Popham, J.*, said, "The common usage of England is, to kill all dogs and cats in all warrens, as well as any vermin, which shews that the law hath always been taken to be, that they may well kill them."

(b) 3 Lev. 28. This was an action of trespass, for killing greyhounds. The defendant justified, for that the greyhounds chased a fallow deer in his park, and there killed it, upon which, to prevent them from doing other mischief

there, he took them and killed them. The plaintiff replied, that the fallow deer was out of the park, on the land of the plaintiff, feeding on his grass, on which he incited the greyhounds to chase it off his land; and that they pursued the fallow deer into the park and there killed it. The defendant demurred, and it was adjudged that the replication was bad, because it did not state that the plaintiff tried to stop the greyhounds at the side of the park, or to prevent their entrance into the park. It was then objected, that the plea was bad, because, although it was not lawful to chase within the park, yet, when the defendant had taken the greyhounds, he ought not to have killed them; and upon this point *Lewis's* case was cited; but, *e contra*, the case of *Wadhurst v. Damme* was cited, and the Court, after consideration, gave judgment for the defendant. In *Lewis's* case, 2 Rol. Ab. 567, tit. "Trespass Justifiable," (L) 2, it is said—"Si home hunt ove un Tumbler en mon Garren, uncore jeo ne pois justifier l'occider del Tumbler ove mon mastife per mon incitation."

In the case of *Grant v. Hulton*, 1 B. & A., 134, where it appeared that a gamekeeper was authorized by his deputation to seize greyhounds, setting dogs, and

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Maule.—In those cases the dogs were in the act of chasing the deer. The matter put in issue here is, that “at the *said* time” the dog was hunting and chasing, wherefore the defendant, for the preservation of the deer, and to hinder the dog from further chasing the deer, shot the dog.

Mr. Justice TAUNTON (in summing up).—It is clear that the defendant shot the dog; but he justifies his having so done, because the dog was chasing the deer. The question for your consideration is, whether the dog was in that situation when the defendant shot it. It is not essential that the dog should have been at that very moment engaged in chasing the deer; it is sufficient if the chasing of the deer and the killing the dog were all one and the same transaction. If you think that the dog was hunting and chasing the deer, and that the defendant shot it to prevent that, the defendant is entitled to a verdict. It appears that there were notice boards fixed up, stating, that dogs would be shot; and a person named Potter also spoke to one of the witnesses to the same effect; so that ample notice appears to have been given. If you think that, before and at the time of the shooting, the dog was chasing the deer, the defendant is entitled to a verdict; but, if you think that the chasing was at an end, and that the dog would not have recommenced, you ought to find a verdict for the plaintiff.

Verdict for the plaintiff—Damages, one farthing.

Maule and *C. Phillips*, for the plaintiff.

Ludlow, Serjt., and *Justice*, for the defendant.

[Attornies—*Protheroe & Phillips*, and *New*.]

ferrets, and to do all things belonging to the office of a game-keeper, according to the directions of the acts of Parliament—

it was held that he was not thereby authorized to seize hounds. See also Com. Dig. tit. “Chase.”

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MILLNE v. SIR MARK WOOD, Bart.

March 26th.

CASE against the defendant as late sheriff of Monmouthshire, for refusing to take bail. The first count of the declaration stated the suing out of a *capias* against the plaintiff by Isaac Williams and others (naming them), indorsed for bail in the sum of 20*l.* and upwards, which was delivered to the defendant as sheriff to be executed; that the defendant arrested the plaintiff and kept him in custody; and that the plaintiff tendered and offered to the said defendant, so being sheriff as aforesaid, reasonable sureties of sufficient persons, to wit, one J. D., one W. W., one W. E., and one W. J., the same being then and there responsible and sufficient persons, and having, and each of them having, sufficient within the county aforesaid, in which said county the said plaintiff was so arrested and so in custody as aforesaid, and who then and there were willing, and offered to become bail and sureties for the appearance of the said plaintiff, according to the exigency of the said writ, yet the defendant, "not regarding his duty," &c. "wrongfully and injuriously refused to accept the said sureties so offered by the said plaintiff as bail for his appearance, according to the exigency of the said writ," and wrongfully detained the plaintiff in prison. The second count was similar, but instead of stating that the bail was offered to, and refused by, the defendant, it stated that the bail "was offered to one Jeffery Pearce, who then and there was the agent of the said defendant so being sheriff as aforesaid, and by him authorized to take bail according to the form of the statute in such case made and provided;" and that the defendant, not regarding his duty, but intending to injure the plaintiff, "then and there by the said Jeffery Pearce, his said agent in that behalf, wrongfully and injuriously refused to accept the said sureties so offered," &c. Plea—General issue.

In an action against the sheriff for refusing to take bail, it is no answer to the action that the party arrested did not tender a bail-bond. The sheriff is to prepare the bond. But, *semble*, that he is entitled to be paid for so doing by the party arrested.

The warrant was put in by the governor of the gaol of

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Monmouth, the seal to it being proved to be the sheriff's seal, by a clerk in the under-sheriff's office.

It appeared that the plaintiff had been arrested by an officer of the defendant named Jeffery Pearce, and was in custody at the Westgate Inn at Newport, and that the clerk of the plaintiff's attorney asked Pearce if bail had been taken; when he replied, that before he took bail he should know who was to pay his fees, which were 2*l.* 12*s.* 6*d*. This sum was placed on the table, and the clerk of the plaintiff's attorney asked the four persons mentioned in the declaration as the intended bail, and who were present at the Westgate Inn, if they were housekeepers, and worth 40*l.* each. He then offered all or any of them as bail, and they were refused by Pearce; and the plaintiff was conveyed to Monmouth gaol, where he remained for several days. Two of the offered bail were called, and they stated that they had offered themselves as bail, and were willing to have become so, and that they were each worth more than 40*l.* after payment of their debts, and that their property to that amount was in the county of Monmouth.

Maule, for the defendant, submitted, that this action could not be maintained, as neither the plaintiff nor any one on his behalf had tendered a bail-bond to the officer. He cited *Watson's Office of Sheriff* (a) and *Tidd's Practice* (b).

(a) Page 104, where it is said—
“On a refusal by the bailiff to discharge a defendant out of custody on a tender to him of a bail-bond, with sufficient sureties, the sheriff and not the bailiff is liable to an action.”

(b) Title “*Bail Bond*.” It is there said—“When the defendant is arrested, and in actual custody, it is the duty of the sheriff to take bail if required, and, therefore, if a bail-bond be tendered with suffi-

ent sureties, and the sheriff refuse to accept it and liberate the defendant, he is liable to a special action on the case.” So, in 2 Wms. Saund. 61 c, (n. 5), it is laid down, that, if the defendant tender a bail-bond with sufficient sureties, and the sheriff refuse to accept it, he is liable to a special action on the case, but not to an action of trespass; for the refusal does not make him a trespasser *ab initio*. These learned authors cite several

Mr. Justice TAUNTON (in summing up).—This is an action for not taking sufficient bail when offered. It has been objected, that the plaintiff has not proved a tender

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cases, but in none of them is it stated that the party arrested must tender the bail-bond. By the stat. 23 Hen. 6, c. 9, it is enacted—“That the said sheriffs and all other officers and ministers aforesaid, shall let out of prison all manner of persons by them or any of them to be arrested, or being in their custody, by force of any writ, bill, or warrant in any action personal, or bycause of indictment of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprise, to keep their days in such place as the said writs, bills, or warrant shall require.” “And that all sheriffs, under-sheriffs, clerks, bailiffs, gaolers, coroners, stewards, bailiffs of franchises, or any other officers or ministers, which do contrary to this ordinance or any point of the same, shall lose to the party in this behalf indamaged or grieved, his treble damages, and shall forfeit the sum of xl. li. at every time that they or any of them do the contrary thereof in any point of the same; whereof the king shall have the one half, to be employed to the use of his house, and in no other wise, and the party that will sue, the other half.” It is essential that the persons offered as bail should have sufficient property *within the county*; therefore, in the case of *Lovell v. Plomer*, 15 East, 320, it was held, that the sheriffs of London, to whom, as such, a special *capias* was direct-

ed, under which they arrested the plaintiff, could not be sued for not having taken bail under this stat., the sufficiency of the bail tendered being only alleged to be within *Middlesex* and *London* taken together, though it was also averred, that from time immemorial the same persons had always been duly appointed to, and had exercised the office of sheriff of the two counties at the same time, and that the defendants were sheriffs of both at the time of the grievances complained of. In the same case it was held, that this statute was a public act, and need not be specially pleaded; and in the case of *Cresswell v. Hoghton*, 6 T. R. 355, it was held, that a party grieved who recovers damages against the sheriff for not taking bail under this statute, is also entitled to costs. In the case of *Matson v. Booth*, 5 M. & S 223, it was held, that a sheriff is bound to let his prisoner, arrested on mesne process, go at large upon reasonable sureties; and a bond with five sureties, three of whom are respectively worth more than the penalty of the bond, is sufficient, though the other two are worth less than the penalty; and in the same case it was also decided, that the addition of another obligor, after the bond had been executed, but before the sheriff has accepted it, with the assent of the sheriff and the prior obligors, does not vacate the bond, or make a new stamp necessary.

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by him of a bail-bond. I cannot find that the burthen of tendering it is thrown upon the plaintiff by the statute, or by any decided case. The statute says, that the sheriff shall let out of prison all manner of persons by him arrested, upon reasonable sureties of sufficient persons having sufficient substance within the county. All that the party has to do, as far as I know, is to tender sufficient sureties. It is for the sheriff's security to take the bond. Therefore, he is to tender the bond. Whether the party arrested be not bound to pay the expenses of the bond before he is liberated is another question: probably the sheriff is entitled to be paid for it by the party arrested. Perhaps in this case the fee of two guineas and a half was intended to cover this charge; however, as it does not appear that the officer required the bond to be tendered, or that the two guineas and a half was not a sufficient sum, the objection respecting the tender of the bail-bond hardly appears to arise.

Verdict for the plaintiff.

Ludlow, Serjt., and R. V. Richards, for the plaintiff.

Maule and Walesby, for the defendant.

[Attornies—*Walker*, and *James Evans*.]

GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE J. PARKE.

March 29th.

POWELL v. HARPER and Others.

Libel, imputing that the plaintiff had received rose-wood, knowing it to

have been stolen. Pleas of justification, stating that B. had stolen the rose-wood from A., and that the plaintiff had received it, knowing it to be stolen:—*Held*, that the defendant's counsel might ask what B. said, with a view of proving that B. committed the larceny; and *held* also, that the plaintiff's counsel might ask the defendant's witnesses what was the plaintiff's general character for honesty.

LIBEL. The declaration stated, that the defendants published of the plaintiff the following libel:—

“ At a meeting of the trade of cabinet makers and upholsterers of Cheltenham, held at Yearsley’s hotel, on Monday, January 21, 1833, the following resolutions were adopted.

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“ *First*, It having appeared to this meeting that Mr. Nicholson has been robbed of certain rosewood chair tops by one of his workmen, which were purchased by a tradesman of this town (meaning the plaintiff), we deem ourselves imperatively called upon to recommend Mr. Nicholson to prosecute both the thief and the receiver, (innuendo, that the plaintiff had received the goods, knowing them to have been stolen); being convinced, that, were facilities not afforded for the disposal of stolen goods, the system of robbing must be speedily abated.”

There was no plea of the general issue; but there were several pleas of justification, stating in substance that the chair tops had been stolen from Mr. Nicholson by a person of the name of Askins, and that the plaintiff had received them, well knowing them to have been stolen.

C. Phillips, for the plaintiff, opened the pleadings—

Talfourd, Serjt., for the defendant, opened his case, and called witnesses in support of the pleas of justification.

One of the witnesses stated that he saw Askins in the plaintiff’s yard.

Godson, for the defendant, proposed to ask what Askins said.

Ludlow, Serjt., for the plaintiff.—I submit that we ought not to hear what Askins said.

Mr. Justice J. PARKE.—Yes. What he said is evidence to shew that he committed the larceny.

The evidence was received.

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 POWELL
 v.
 HARPER.

Ludlow, Serjt., proposed to ask the defendant's witnesses, what was the plaintiff's general character for honesty.

Mr. Justice J. PARKE.—I think that that is a legitimate question.

The question was put.

Verdict for the plaintiff—Damages, 40s.

Ludlow, Serjt., and *C. Phillips*, for the plaintiff.

Talfourd, Serjt., and *Godson*, for the defendants.

[Attornies—*Winterbottom*, and *Packwood*,]

March 30th. DOE on the demise of SHELLARD, Assignee of HARRIS the elder, an Insolvent, v. HARRIS the younger.

The protection of communications made by a client to his attorney, applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity.

An attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or an unlawful purpose.

EJECTMENT for two cottages and a piece of land at Bitton.

The real question in the case was, whether a deed dated in the year 1825, by which the property was conveyed by the insolvent to the defendant, was a *bond fide* or a fraudulent conveyance.

On the part of the lessor of the plaintiff, Mr. Stanley, an attorney, was called; and it was proposed, on the part of the lessor of the plaintiff, to ask him whether the insolvent had not applied to him to draw a conveyance in fraud of the creditors?

Ludlow, Serjt., for the defendant, objected that any conference between a client and his attorney was privileged; and he cited the case of *Cromack v. Heathcote* (a).

(a) 2 B. & B. 4. In that case an attorney, who had been requested to draw an assignment of goods, had refused to do so; and the deed was drawn by another. The validity of the deed was afterwards

Talfourd, Serjt., *contra*.—It was held in the case of *Williams v. Mudie* (a), that the privilege was confined to cases where the communication relates to the bringing or defending an action; and, besides, no privilege can originate in an intended fraud. This is quite different from the case of a party confessing a by-gone crime to his attorney for the purpose of his defence, which of course would be privileged.

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 —————
 Doe
d.
 SHELLARD
v.
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Mr. Justice J. PARKE.—I should not limit the privilege to those cases in which an action is contemplated. The Lord Chancellor has recently consulted with the two Lord Chief Justices and the Lord Chief Baron, and they considered that the privilege was not limited in the way that was stated by Lord *Tenterden*. The protection applies, in my opinion, to all cases in which the relation of attorney and client subsists. I believe that the case decided by Lord *Tenterden* was the first in which the law was laid down with the limitation that he put upon it.

R. V. Richards.—There was also the case of *Broad v. Pitt* (b), decided in the Court of Common Pleas; and the case of *Williams v. Mudie* was also acted upon in Ireland (c).

Mr. Justice J. PARKE.—I am aware that that case had been acted on since; but I consider that it has now been overruled by the Lord Chancellor, the Lord Chief Justices, and the Lord Chief Baron.

questioned, on the ground of fraud, in an action against the sheriff, in which the attorney first applied to was not employed. At the trial, it was held by *Richards*, C. B., that the communication made to this attorney was professional, and could not be given in evidence; and the Court of Common Pleas, on a motion for a new

trial, were unanimously of opinion, that the evidence of fraud, proposed to be given by means of proving this communication with the attorney, was properly rejected.

(a) *Ante*, Vol. 1, p. 158.

(b) *Ante*, Vol. 3, p. 518.

(c) We believe in the case of *Rex v. O'Connell*, which was a trial at bar.

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—
DOE
d.
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HARRIS.

Talfourd, Serjt., proposed to ask the witness, whether the insolvent asked his advice for a lawful or an unlawful purpose?

Ludlow, Serjt., objected to the question.

Talfourd, Serjt.—I must ask it, unless your Lordship decides that there is no difference between a lawful and an unlawful communication, and that both are equally privileged.

Mr. Justice J. PARKE.—There is a great deal of difficulty in the witness's disclosing whether the conference between him and his client was for a lawful or an unlawful purpose, without our being told what it was. It might be that the party asked if a particular thing could legally be done.

Talfourd, Serjt., proposed to ask, if the insolvent applied to the witness to draw a certain deed?

Mr. Justice J. PARKE.—I think, on the authority of the case of *Cromack v. Heathcote*, that that question cannot be put.

Talfourd, Serjt.—That case can perhaps hardly be sustained to its full extent.

Mr. Justice J. PARKE.—I think that the safe course would be for me to abide by the case of *Cromack v. Heathcote*. I will, however, make a note of the objection. I am of opinion that the privilege applies to all cases where the client applies to the attorney in a professional capacity; and an application to draw a deed is, I think, of that description.

The evidence was rejected.

Verdict for the plaintiff.

Talfourd, Serjt., and *R. V. Richards*, for the lessor of the plaintiff.

Ludlow, Serjt., and *Justice*, for the defendant.

[Attornies—*Drewe*, and *Hinton*.]

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DOE
d.
SHELLARD
v.
HARRIS.

This case was mentioned by Mr. Justice *J. Parke*, on the argument of the case of *Moore v. Terrill*, in K. B., Easter Term, 1833.

DOE on the demise of HIATT and Others v. MILLER.

April 1st.

EJECTMENT. The lessors of the plaintiff having proved their title—

Curwood, for the defendant, opened, that, in the year 1828, one of the lessors of the plaintiff had agreed to sell the land in question to a person named Blackwell, who had paid 524*l.*, which was part of the purchase money, on which he was let into possession; he being willing to pay 113*l.* more, which was the residue of the purchase money, on a proper conveyance being executed.

Mr. Justice *J. PARKE*.—If there has been any demand of possession, or any thing to determine the estate at will which Mr. Blackwell had, the plaintiff is entitled to recover at law.

On the part of the plaintiff, a demand of possession was proved.

Mr. Justice *J. PARKE* directed a—

Verdict for the plaintiff.

Ludlow, Serjt., and *R. V. Richards*, for the lessors of the plaintiff.

Curwood and *Justice*, for the defendant.

[Attornies—*Warren*, and *Lambert*.]

A., having agreed to buy certain lands of B., had paid part of the purchase money, and was let into possession. B. had not executed any conveyance:—*Held*, that this was a mere tenancy at will in A., and that, if B. had made a demand of possession, to determine the tenancy at will, he might recover the lands by ejectment.

1833.

April 2nd.

THOMAS v. MARSH and NEST.

By a private act of Parliament, the shire-hall of G. was vested in the justices of the peace for the county, in trust, to allow courts of justice to sit there, &c., and to permit and suffer it to be used for such other public purposes as a major part of the justices in Sessions should direct. The hall had always been used for the holding of the county musical festivals; but there was no evidence that the justices had, under that act, so directed it to be used:—

Held, that the stewards of one of these musical festivals had such a possession of the hall, that they might justify the turning out an intruder. If, in answer to a plea of justification, stating that the plaintiff was intruding himself there, the plaintiff rely on his having a ticket, as giving him a right to be there, he must reply that specially.

A replication *de injuria* in

trespass, with a new assignment, that the defendant committed the trespasses with more violence, and in a greater degree than was necessary for the purposes in the plea mentioned, is demurrable.

ACTION for assaulting the plaintiff in a certain building at Gloucester, called the County Hall. Pleas—*First*, the general issue. *Secondly*, that, at the time when &c., the Right Hon. Lord Redesdale, R. S. H., Esq., C. W. C., Esq., the Rev. J. H. S., the Rev. M. F. T. S., and the Rev. R. W. G., were lawfully possessed of the said building called the County Hall; and that, being so possessed, the said plaintiff, just before the said time when &c., to wit, on &c., was unlawfully in the said building and making a great noise and disturbance, and stayed and continued making such noise and disturbance, against the will, and without the leave of the said Right Hon. Lord R. &c.; and thereupon the defendants, as servants of the said Lord R. &c., “then and there requested the said plaintiff to cease making the said noise and disturbance, and to depart from and out of the said building, which the said plaintiff refused to do;” whereupon the defendants gently laid their hands on him, and removed him. *Third* plea, that Lord Redesdale, &c., were the stewards of a certain musical festival, and as such were possessed of the County Hall for the celebrating the said festival, “and that no persons were admitted into the said building, except upon presenting a proper ticket of admission;” that the defendants were peace officers, and directed by the stewards to prevent any person from entering or being in the building, except upon such person presenting a proper ticket of admission; that the plaintiff came there without presenting a proper ticket of admission; and that he was requested to depart out of the building unless he presented a proper ticket, which he refused to do; and therefore the defendants gently laid hands on him, &c.

Replication—That the defendants committed the trespasses of their own wrong, and without the cause afore-

said; and that they seized and laid hold of the plaintiff "with more force and violence, in a greater degree and to a greater extent, than was necessary for the purposes" in the pleas mentioned (a). Plea to the new assignment—
Not guilty.

It appeared, that, on the 13th of September, 1832, there was a musical festival and ball at the Shire-hall, at Glouces-

(a) As this form of replication is not unfrequently seen in practice; and, as the learned Judge stated it to be demurrable, we have thought it best to set it forth at length. It was in the usual form of a replication *de injuriâ* to each of the special pleas, concluding to the country; and it then continued—"And the plaintiff further says, that he exhibited his said bill against the said defendants, and brought his action thereon, not only for the several trespasses in the respective introductory parts of the said second and third pleas mentioned and referred to, and attempted to be justified; but for that the said defendants, at the said times when &c. in the said declaration mentioned, with force and arms &c. seized and laid hold of the said plaintiff, and pulled, forced, and dragged him down the steps or stairs, and pulled, forced, and cast him from and out of the said building into the said street, as in the first count mentioned, and laid hold of him, as in the second count mentioned, with more force and violence, and in a greater degree, and to a greater extent, than was necessary for the purposes in those pleas, or either of them, mentioned, in manner and form as the said plaintiff hath above thereof complained against them the said defendants; which said trespasses

above newly assigned are other and different trespasses than the said trespasses in the said respective introductions to the said second or third pleas mentioned, and therein attempted to be justified; wherefore, inasmuch as the said defendants have not answered the said trespasses above newly assigned, the said plaintiff prays judgment, and his damages by him sustained on occasion of the committing thereof, to be adjudged to him," &c.

Rejoinder.—A *similiter* to each *de injuriâ*—"And the said defendants, as to the said several supposed trespasses newly assigned, say that they are not guilty thereof, or of any part thereof, in manner and form aforesaid," concluding to the country.

A new assignment that the trespass was in other lands, being in nature of a declaration, the defendant must plead to it in the same way as to a declaration. *Odiham v. Smith*, Cro. El. 589; *Moore*, 540; *Goldsborough*, 191. As to new assignments, see *Greene v. Jones*, 1 Wms. Saunders, 297 et seq., and the notes of Mr. Justice *Patteson* and Mr. *E. V. Williams* to that case. And as to costs in cases where there are new assignments, see the case of *Broadbent v. Shaw*, 2 B. & Ad. 940.

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v.
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ter, under the management of the six stewards named in the pleas; and that the musical festivals had been held in the Shire-hall ever since it had been built; but there was no evidence of any vote of the magistrates at the Quarter Sessions permitting its use in that way, although five of the stewards were also magistrates of the county; and it was proved by Mr. Goodrich, a magistrate, that he had attended the sessions for twenty years, and had never heard of any such permission. It further appeared, that the defendants were police officers, stationed at the Shire-hall to preserve order; and that Mr. Ford, one of the stewards, had directed them to keep the top of the grand staircase clear. It was proved, that the plaintiff had come up the grand staircase, and had his hand on the door of the ball-room as if going in; and that the defendants told him that he must not go in unless he produced a ticket. He then produced a performer's ticket; but was told that that ticket was for another entrance, which was the fact. The plaintiff insisted on going into the ball-room; and the defendants laid hold of him and pulled him down the stairs, and put him into the street.

Ludlow, Serjt., for the plaintiff.—By the act of Parliament under which this hall was built, the defendants could have no right to be in it and turn other persons out of it, unless they had an authority from a majority of the magistrates at the sessions (a).

(a) By the private act of Parliament, 54 Geo. 3, c. clxxv, s. 59, intituled 'An act for the erecting a Shire-hall, and Courts for the administration of justice, and other buildings for public purposes for the county of Gloucester and county of the city of Gloucester,' it is enacted, that the Shire-hall and buildings "shall hereby from henceforth be vested in, and the same are hereby from henceforth

vested in the justices of the peace for the time being for the said county of Gloucester, upon trust, and to the end, intent, and purpose" to allow the Courts of assize, sessions, hundred courts, county and city meetings, &c., to be held there, and to also "peaceably, quietly, and freely permit and suffer the said Courts of justice, Shire-hall, and other buildings and premises, to be had, used, and en-

Mr. Justice J. PARKE.—There does not appear to have been any order of Sessions; but the stewards had possession of the hall, and that is sufficient against a wrong-doer. You must rely on your new assignment; which, however, is certainly demurrable. The first plea states that the plaintiff was intruding himself into the hall; and, if he relied on his ticket as giving him a special right to be there, he should have replied it specially.

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MARSH.

Ludlow, Serjt., replied, and went to the jury on the question of excess.

Mr. Justice J. PARKE (in summing up).—The pleas in this case state, that the plaintiff was making a great noise and disturbance; but that is not material in this case, as there was a request made to him to depart. The defendants have shewn that the stewards of the musical festival had possession of the hall for their concerts and balls; and I think there is abundant evidence that they were in possession as against any person who had not a better right, although there is no evidence that they had the permission of the magistrates under the act of Parliament. If the plaintiff had meant to have relied on his ticket as giving him a right to be there, he should have replied it. The stewards having possession of the hall for this purpose, they must not only be taken to have the use of the rooms, but the avenues; for, if they had not a right to keep out improper persons, it would be of no use for them to have the hall. The officers for this purpose were their servants; and they gave the plaintiff notice to depart. The question therefore is, whether the defendants used unnecessary vio-

joyed for such other public uses and purposes as the justices of the peace for the time being for the said county of Gloucester, at the General Quarter Sessions of the peace for the said county, or the

major part of them, shall from time to time direct, order, or appoint." The section then goes on to provide for the Shire-hall being used for the holding of meetings, &c., for the city of Gloucester.

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v.
MARSH.

lence in removing the plaintiff, as they had authority to use such force as was necessary to turn him out.

Verdict for the defendants.

Ludlow, Serjt., and *Busby*, for the plaintiff.

C. Phillips, and *Justice*, for the defendants.

[Attornies—*Smallridge*, and *White & W.*]

(*Crown Side.*)

BEFORE MR. JUSTICE TAUNTON.

April 5th. REX v. NICHOLS, GEORGE ORGAN PARSONS, and SARAH PARSONS.

The counsel for the prosecution in a case of felony opened that he should call A. and B. as witnesses, the former being a King's evidence. Both before and after those persons were called, the prisoner's counsel were allowed to ask the other witnesses, whether A. and B. were not persons of very bad character.

INDICTMENT against Thomas Nichols and George Organ Parsons, for robbing Henry Eade Stephens of sovereigns, bank notes, and promissory notes, and against Sarah Parsons, as an accessory after the fact, in harbouring G. O. Parsons.

Justice, for the prosecution, opened, that he should call a King's evidence, named John Smith, and also a witness named Ann Mercer.

Mr. Justice J. PARKE, both before and after those persons were called, allowed the prisoners' counsel to ask the other witnesses for the prosecution, whether John Smith and Ann Mercer were not persons of very bad character.

Mr. Jackson, one of the witnesses for the prosecution, said, in answer to that question, and to the question whether he would believe those persons on their oaths—that they were both persons of very bad character; and, although he would not say he would not believe them on

their oaths, yet he should not like to act on their testimony, unless it was confirmed by other evidence.

1833.

REX
v.
NICHOLS.

Verdict—G. O. Parsons, Guilty; Thomas Nichols and Sarah Parsons, Not guilty.

Justice, W. J. Alexander, and Chichester, for the prosecution.

Curwood and Carrington, for the prisoner Nichols.

Watson, for the other prisoners.

[Attornies—*Bloxsome & Co.*, for the prosecution—*Weight and Crook*, for the respective prisoners.]



REX v. JAMES BERRIMAN and THOMAS BERRIMAN.

April 6th.

ROBBERY. The property was laid in John Hancox. The son of the prosecutor stated, that his father's name was John Walter Hancox.

In an indictment for robbery the property was laid in J. H. It appeared that the prosecutor's name was J. W. H.:—*Held*, not material, if he was generally known by the name of J. H.

Mr. Justice J. PARKE.—Is your father generally known by the name of John Hancox?

The witness.—Yes, my Lord.

The case proceeded: but, at a later stage of it, the prosecutor being called, it then appeared that his name was correctly stated in the indictment.

Verdict—Guilty.

Justice and Phillpotts, for the prosecution.

C. Watson, for the prisoners.

[Attornies—*Newman*, and *Crook*.]

See the case of *Rex v. Sheen*, *ante*, Vol. 2, p. 634.

NORTHERN CIRCUIT,

1833.

BEFORE MR. JUSTICE ALDERSON AND MR. BARON GURNEY.

(Crown Side.)

BEFORE MR. BARON GURNEY.

1833.

March 12th.

REX v. BINGLEY and LAW.

A. was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—
Held, robbery.

ROBBERY.—The prisoners were indicted for robbing John Atkinson of “one piece of writing paper, of the value of one penny, one other piece of paper, of the value of one penny, and one written memorandum, of the value of one penny, of the goods and chattels of the said John Atkinson.”

It appeared that the prosecutor had, in the month of February, 1833, been at Pontefract Market; and that, before he left Pontefract, he had given all his money into the charge of the landlord of the inn at which he had taken refreshment; so that when he left the inn to go home, he had nothing in his pockets, except a slip of paper, which contained a memorandum of a sum of money which a person owed him. On his way home, the two prisoners rushed upon him and knocked him down, and after beating him till he was disabled, they rifled his pockets and left him; when he came to himself, he missed the slip of paper, which was never found afterwards.

GURNEY, B.—If any thing was taken away from the

prosecutor by violence, however insignificant its value, that is sufficient to constitute robbery. In cases of robbery, the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, shewed that he considered that it was of some value to himself (a).

1833.

REX
v.
BINGLEY.

Verdict—Guilty.

(a) In larceny and robbery, the *value* of the thing stolen is immaterial, but still it must be of *some* value to the person robbed; and therefore, where a prisoner compelled the prosecutor, by threats, to give her his promissory note for a sum of money, which was therefore a void instrument in law, this was holden by the Judges not to be robbery, because the note was of no value to the prosecutor. *Rex v. Phipoe*, 2 Leach, 673. In the case of *Rex v. Henry Clerk, R. & R. C. C. R.* 181, where it was held, that stealing re-issuable notes after they had been paid, and before they were, in fact, re-issued, did not subject the party to an indictment on 2 Geo. 2, c. 25 [then in force]

for stealing notes: it was also held that the party might be convicted on counts for larceny, in stealing "so many pieces of paper, each piece of the said paper being respectively stamped with a stamp of 4*d.*, and being of the value of 4*d.*;" for, although it was contended that the paper and stamps in their then state were worth nothing, and that *they would not sell for so much as a farthing*, and that nothing could be the subject of larceny which was not worth the smallest current coin in the kingdom; yet the Judges held the conviction for larceny on these latter counts good, for the paper and stamps, particularly the latter, were valuable to the owners.

1833.

(Civil Side.)

BEFORE MR. JUSTICE ALDERSON.

March 14th.

COPE v. COPE.

If a husband have access, and others at the same period have a criminal intimacy with his wife, and she have a child, such child is legitimate; but if the husband and wife be living separately, and the wife is notoriously living in adultery, a child born under such circumstances would be illegitimate, although the husband had an opportunity of access. On the trial of an issue, in which the question is, whether A. is the legitimate son of B., neither the declarations of B., nor of his wife, the mother of A., are receivable to shew that A. is illegitimate.

ISSUE directed by the Master of the Rolls, to try whether the plaintiff, William Cope, was the legitimate son of Richard Cope.

It appeared that Richard Cope and his wife had lived together for some years; but that, several years before the birth of the plaintiff, Richard Cope went to work at a place about fourteen miles distant from the place at which his wife and himself had resided, and at which she continued to reside; and it appeared that, from that time, Richard Cope resided near the place at which he worked, but that he used to come home to the house at which his wife resided, at intervals of from three to six weeks; and that he always maintained his wife. The plaintiff's mother had five children, of whom the plaintiff was the youngest.

F. Pollock, for the defendant, proposed to give evidence of the declarations of the plaintiff's mother, as to the illegitimacy of the plaintiff.

ALDERSON, J., rejected the evidence.

F. Pollock, proposed to give evidence of the declarations of Richard Cope, that the plaintiff was not legitimate.

ALDERSON, J.—It has been decided by Lord *Hardwicke*, that the declarations of a wife are not receivable to bastardize her child; and I think, *a fortiori*, that the de-

clarations of the husband ought not. Lords *Hardwicke* and *Mansfield*, have both decided, that illegitimacy can only be made out by the fact of there having been no marriage, or by proof of non-access.

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COPE
v.
COPE.

The evidence was rejected.

For the defendant, a copy of the plaintiff's baptismal register was put in, in which he was described as the illegitimate son of Isabella Cope. The clergyman by whom the plaintiff was baptized was living, but was not called as a witness.

ALDERSON, J., (in summing up).—If a child be born in marriage, during the life-time of the husband, it is presumed to be legitimate. It appears that the plaintiff in this case is the youngest child, that he was born after four other children, and during the lifetime of Richard Cope. He therefore is clearly legitimate, unless it be proved that the husband had no access. Now, it is shewn that he had opportunity of access, and if a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law. But, if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose, that, under these circumstances, he would avail himself of such opportunity. The legitimacy of a child born under such circumstances could therefore not be established.

Verdict for the plaintiff.

J. Williams, C. Cresswell, and Wrangham, for the plaintiff.

CASES ON THE NORTHERN CIRCUIT

F. Pollock, Jones, Searle, and Wiglesworth 1225
 London.

See the case of Morris v. Dumas, and also the report in the
 Law Reports, Vol. 1, pp. 25 and 27, and the Garston Papers, Vol. 1,
 the substance there referred to: of Law.

PROMOTIONS.

In the year after Hilary Term, D. P.
 the names of the following were promoted to the
 rank of Judge of the Court of Common Pleas.
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TO THE

PRINCIPAL MATTERS.

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See RAPE.

CESSARY.

essential that there should be direct communication necessary before the fact of a capital felon. It is enough to direct an intermediate person to commit the crime and it will be sufficient if the necessary does not name the person to be procured, but merely to employ some person as a cooperator,

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COMPLICE.

ANSLAUGHTER, 4.

ought not to be con-
evidence of any num-
plices, unconfirmed by
y. *Rex v. Noakes*, 326

ADMINISTRATOR.

and died in the month of
next of kin took out let-
administration in the same
event and lived in her
month of November,
as of the intestate in the
ized under a *fieri facias*
Administrator for a debt

of his own:—*Held*, that an action lay against the sheriff by the administrator, in his representative capacity, for this seizure. But, *semble*, that, if the administrator had remained in possession for a very long time, it would have been otherwise. *Gaskell v. Marshall*. 31

ADULTERY.

In an action of crim. con., letters written by the wife to third persons, before she became acquainted with the defendant, and in which she mentioned her husband, are receivable in evidence to shew the terms on which they were with respect to affection. *Willis v. Bernard.* 342

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

A. having printed a work, sold 300 copies to B., a bookseller, at 40*s.* a copy, binding himself not to sell to others, in quires, under 48*s.*, and in single copies under 50*s.* a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B. "I do not expect you to sell under 48*s.* and 50*s.*, but do as you like."

1833.

COPE

v.

COPE.

F. Pollock, Jones, Serjt., and Wightman, for the defendant.

See the case of *Morris v. Davies*, ante, Vol. 3, pp. 215 and 427, and the authorities there referred to; and also the report of the case of the *Gardner Peerage*, in the House of Lords.

PROMOTIONS.

IN the vacation after Hilary Term, *D. Pollock, Esq., Philip Courtenay, Esq., J. Blackburne, Esq., and W. H. Maule, Esq.*, were appointed his Majesty's counsel learned in the law.

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TO THE

PRINCIPAL MATTERS.

ABUSING CHILDREN.

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ACCESSARY.

It is not essential that there should have been any direct communication between an accessary before the fact and the principal felon. It is enough if the accessary direct an intermediate agent to procure another to commit the felony; and it will be sufficient even if the accessary does not name the person to be procured, but merely directs the agent to employ some person. *Rex v. Cooper*, 535

ACCOMPLICE.

See MANSLAUGHTER, 4.

A prisoner ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *Rex v. Noakes*, 326

ADMINISTRATOR.

An intestate died in the month of August: her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November, when the goods of the intestate in the house were seized under a *fiery facias* against the administrator for a debt

of his own:—*Held*, that an action lay against the sheriff by the administrator, in his representative capacity, for this seizure. But, *semble*, that, if the administrator had remained in possession for a very long time, it would have been otherwise. *Gaskell v. Marshall*, 31

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See PRINCIPAL AND AGENT.

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A. having printed a work, sold 300 copies to B., a bookseller, at 40s. a copy, binding himself not to sell to others, in quires, under 48s., and in single copies under 50s. a copy, until B.'s 300 were sold, or his consent was obtained. In his letter, which constituted the agreement, he said to B. "I do not expect you to sell under 48s. and 50s., but do as you like."

When B. had sold a part of the 300 copies, he went into partnership with C., and transferred all his stock at the cost price. He also sold some copies at 45s. and 46s.—A., in contravention of his agreement, sold under the stipulated prices; but, on being threatened with proceedings by B., persuaded D., who had purchased the principal part, to consent to give them back, if it would satisfy B.—D. had an interview with B., and told him this. D. said, that he understood the arrangement was a settlement of the difference, and that B. went away from the interview perfectly satisfied:—*Held*, in an action by B. against A. for a breach of the agreement, that neither the underselling by B. nor the transfer of the stock to the partnership, were grounds of nonsuit; but that the arrangement with D. was an answer to the action, if the jury thought it made an end of the dispute between the parties. *Held*, also, that, on the question of damages, it might be considered whether B.'s own underselling had or had not contributed to affect the price of the work in the market. *Benning v. Dove*, 427

ALIEN.

1. A. resided in Pennsylvania before the declaration of American independence, and he had a son, B., born there also before that period. In 1783, A. came to England, to get compensation for losses as an American loyalist. In 1785, A. returned to Pennsylvania, where he died. B. never was in England. *Semble*, that both A. and B. were American subjects, and that A. became so by returning to Pennsylvania in 1785; and that a claim to lands could only (if at all) be made through them under the stat. 37 Geo. 3, c. 97, s. 24. *Doe d. Stansbury v. Arkwright*, 575

2. What A. said in England as to why he came, is evidence. *Ibid.*

ARSON.

AMERICAN.

See ALIEN.

APOTHECARY. .

A diploma of M.D. from the University of St. Andrew's, in Scotland, is no defence to an action for penalties under the 55 Geo. 3, c. 194, s. 20, for practising as an apothecary, without having obtained a certificate from the Apothecaries' Company; and, *semble*, that a similar diploma from an English university would not be so. *The Apothecaries' Company v. Collins*, 519

APPREHENSION.

See IMPRISONMENT.

Magistrates have no authority to detain a person known to them, till some other person makes a charge against him. Before they detain a known person, they should have a charge actually made. *Rex v. Birnie*, 206

ARSON.

See OUTHOUSE.—LORD CHIEF JUSTICE TINDAL'S CHARGE, p. 265, n.

1. If a person set fire to a stack, the fire from which is likely to and which does communicate to a barn, which is thereby burnt, the person is indictable for burning the barn. *Rex v. Cooper*, 535

2. A prisoner tried at the assizes for arson, on Wednesday, the 20th of March, was, on Monday the 18th, served at the prison with a notice to produce a policy of insurance. The commission-day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—*Held*, that the notice was served too late. *Rex v. Ellicombe*, 522

3. *Held*, also, that the intent to defraud an insurance office being charged in the indictment, was not such notice to the prisoner as would make a notice to produce the policy unnecessary. *Ibid.*

ASSAULT.

1. One of the marshals of the city of London, whose duty it was, on the day of a public meeting in the Guild-hall, to see that a passage was kept for the transit to their carriages of the members of the corporation and others, directed a person in the front of a crowd at the entrance to stand back, and, on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him:—*Held*, that in so doing the marshal exceeded his authority, and that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way. *Imason v. Cope*, 193

2. If one of two persons, fighting, unintentionally strikes a third, he is answerable in an action for an assault, and the absence of intention can only be urged in mitigation of damages. *James v. Campbell*, 372

ATTORNEY.

See EVIDENCE, 8, 18, 19.

1. A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered:—*Held*, that A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second. *Heming v. Wilton*, 54

2. An attorney brought an action against the petitioning creditor, under a commission of bankrupt, for business done previous to the assignment:—*Held*, that, notwithstanding the 14th sect. of the bankrupt act (6 Geo. 4, c. 16), he might maintain the action without proof that his charges

had been allowed by the commissioners, according to the provisions of that section, as the whole was matter of investigation before the taxing officer. *Fisher v. Filmer*, 92

3. When two persons are in partnership as attornies, it is sufficient, under the statutes 3 Jac. 1, c. 7, and 2 Geo. 2, c. 23, if their bill for business done is signed in the name of the firm, without the Christian name of either partner. *Smith v. Brown*, 94

4. An attorney in a cause is not answerable for the absence, neglect, or want of attention in the counsel engaged in it. *Lowry v. Guilford*, 234

5. Two persons in partnership as attornies may recover in a joint action, for business done in the Palace Court, although it appear that one of them only was a person entitled to practise in that court. *Arden v. Tucker*, 248

6. An attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or an unlawful purpose. *Doe d. Shellard v. Harris*, 592

7. The protection of communications made by a client to his attorney applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity. *Ibid.*

AUTHOR.

1. An author was engaged to write for a certain sum an article to appear among others in a work called "The Juvenile Library." Before he had completed his article, and before any portion of it was published, the work in which it was to appear was discontinued:—*Held*, that the publishers were not entitled to claim the completion of the article, that it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part which he had prepared. *Held*,

also, that such reasonable sum was recoverable on a *quantum meruit* in a common count for work and labour.

Planche v. Colburn, 58

2. If A., being the author of a law book, sell the copyright to B., and B. publish a third edition of the work edited by another, but not stated to be so, and which purchasers were likely to suppose was edited by A., such edition having errors and mistakes in it calculated to injure the reputation of A. as an author:—*Held*, at *Nisi Prius*, that, for this, an action lies by A. against B. The question, whether an edition purports to have been edited by A. is a question for the Jury; but the question, whether the alleged errors and mistakes be so or not, and whether they are such as are calculated to injure the reputation of A. as an author, are questions for the Court. *Archbold v. Sweet*, 219

BAIL.

1. One of the bail was called as a witness for the defendant and objected to; but on a sum equal to double the amount sworn to being deposited with the marshal of the L. C. B., his Lordship struck the witness's name out of the bail piece, and he was examined. *Pearcy v. Fleming*, 503

2. In an action against the sheriff for refusing to take bail, it is no answer to the action that the party arrested did not tender a bail bond. The sheriff is to prepare the bond. But, *semble*, that he is entitled to be paid for so doing by the party arrested. *Millne v. Sir M. Wood*, 587

BANKRUPT.

See CONCORDAT.—EVIDENCE, 8.—MALICIOUSLY SUING OUT A COMMISSION OF BANKRUPT.

1. A. was entitled to commission for introducing to a tradesman a purchaser for his business, which was to be paid on the completion of the bar-

BILL OF EXCHANGE.

gain. After he had introduced the purchaser, but before the matter was settled, he became bankrupt, and his assignees brought an action for the commission, which they afterwards discontinued, and wrote to him, saying that they disclaimed all right to the money. A. upon this brought an action in his own name:—*Held*, that he was not entitled to recover. *Hilary v. Morris*, 6

2. A bankrupt is not indictable on the stat. 6 Geo. 4, c. 16, s. 112, for concealing his books till after he has concluded his last examination. *Rex v. Walters*, 138

3. Parol evidence of any thing that a bankrupt says at the time of his last examination cannot be received, although it should appear that no part of what he said was taken down in writing. *Ibid.*

4. Whether, on such an indictment, the petitioning creditor is a competent witness to prove the petitioning creditor's debt—*Quære*. *Ibid.*

5. Where the bankruptcy of a party is stated in an allegation, in an indictment for a conspiracy, the assignment cannot be received as evidence in support of such allegation, unless it be proved by the subscribing witness. *Rex v. Pope*, 208

BIGAMY.

On an indictment against a man for bigamy, it appeared that, for the purpose of concealment, the second wife was married by a name by which she had never been known:—*Held*, that this was no answer to the charge, although, if the first marriage had taken place under such circumstances, that would have been thereby rendered void. *Rex v. Penson*, 412

BILL OF EXCHANGE.

See COMPOSITION, 2.—EVIDENCE, 9.—WITNESS, 3.

1. A publican took from a person,

who boarded and lodged in his house, a bill and a note, both at one time, for his score, part of which consisted of a demand for spirits, but not to the amount of either bill or note; money was also paid on account:—*Held*, in an action on the securities, that, although they were given at the same time, the plaintiff might recover on one of them, and also that he might apply the money paid in reduction of the demand for spirits, although such demand could not be recovered, in consequence of the act of 24 Geo. 2, c. 40. *Crookshank v. Rose*, 19

2. Where a bill is by the acceptor made payable at a particular place which is not his residence, proof of presentment at that place is not sufficient in an action against the drawer, without proof of the acceptor's handwriting. *Sedgwick v. Jager*, 199

3. *Semble*, that an indorsee for value, who receives part payment from the drawer of an accommodation bill, and takes a new bill to give time for the payment of the remainder, does not thereby discharge the acceptor, unless he was aware that the acceptance had been given for the drawer's accommodation. *Rolfe v. Wyatt*, 181

Whether, if he knew that fact, it would make any difference—*Quære. Ibid.*

4. The traveller of a tradesman in London called on his employer's debtor in the country, and, being unable to obtain cash, consented, at the request of the debtor, to take an acceptance for the amount, and wrote the whole form of a bill except the name of the drawer, and sent it up to his employer, telling the debtor that he did not think it would be satisfactory. The employer kept the bill, but did not put his name to it as drawer. The traveller had no authority to sign bills, but was in the habit of sending them up without a drawer's name, to prevent risk by loss:—*Held*, that these facts did not amount to proof of the

drawing of a bill so as to prevent the creditor from recovering for his original demand, before the instrument purporting to be a bill became due.

Vyse v. Clarke, 403

5. An offer on the part of the indorser of a bill to pay part of the amount, and the costs, and to give a warrant of attorney for the residue, will not dispense with the proof of notice of dishonour. *Standage v. Creighton*, 406

6. It was proved, in an action against the indorser of a bill of exchange, that, two months after it was due, it was produced to him, and inquiries were made as to the drawer and acceptor; upon which he said, that if the holder would take 10s. in the pound, he would secure it:—*Held*, sufficient to dispense with proof of notice of dishonour. *Dixon v. Elliott*, 437

7. A bill of exchange for *twenty-five seventeen* shillings and three pence, is a bill of exchange for twenty-five pounds seventeen shillings and three pence, and may be declared on as such. *Phipps v. Tanner*, 488

8. A. procured a banking company to advance 100*l.* on a bill of exchange for 300*l.*, A. giving the company his guarantie for the amount so advanced, but having no other interest in the bill:—*Held*, that A. might recover the whole amount of the bill in an action against the acceptor, and not merely the amount for which he gave his guarantie. *Reid v. Furnival*, 499

9. In an action on a bill of exchange, where the defence is that the bill had been altered, the defendant cannot go into evidence to shew that other bills had been likewise altered. *Thompson v. Mosely*, 501

BOND.

See STAMP.

A bond was executed by a person

who could not write:—*Held*, that if there was no other plea besides *non est factum*, the defendant's counsel could not ask whether the bond was read over to the defendant before he signed it, nor what was the transaction respecting which it was given. *Cranbrook v. Dadd*, 402

BRIBERY.

See TREATING.

1. Two of the electors of a borough went to a banker there, and said, they wished to draw checks upon the bank. The banker promised to honour any checks they might draw. The checks drawn were signed by one only, but the account in the banker's books was opened in the joint names:—*Held*, that they might maintain a joint action against the candidate in whose interest they were, if he adopted the payments made. *Bremridge v. Campbell*, 186

2. *Seem*, that, where the same sum is given to every voter coming from the same *place* to an election, for his travelling expenses, it is bribery; and it is not the less so, though all the candidates agree in the payment of the same amount. But it is for the jury to say, in an action by an agent of the candidate to recover the amount from his principal, whether the money was *bona fide* paid for expenses, and expenses *only*. *Ibid*.

BUILDING ACT.

The building act, 14 Geo. 3, c. 78, s. 100, limits actions to be brought within three months. A. had begun to build a party wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—*Held*, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three

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months, he must bring ejectment. *Trotter v. Simpson*, 51

BURGLARY.

If a married woman take a house, in which a burglary is committed, the house must be laid as the house of the husband, although she be living separate from him. *Rex v. Smyth*, 201

CARRIER.

See STAGE COACH.

1. In stating the *termini* of the journey in declaring against a carrier, the word London will be taken as a *nomen collectivum*, including all that is commonly so called, and not the city merely. *Beckford v. Crutwell*, 242

2. If a carrier directs goods to be sent to a particular booking office, he is answerable for the negligence of the booking office keeper. *Colepepper v. Good*, 380

3. In an action against the carrier, the person at the booking office who delivered the goods to the carrier, is a competent witness to prove the state in which they were delivered. *Ibid*.

CATTLE.

If A. set fire to a cow-house and burn to death a cow which is in it, A. is indictable under the statute 7 & 8 Geo. 4, c. 30, s. 16, for killing the cow. *Rex v. Haughton*, 559

CERTIFICATE FOR EXECUTION.

1. Practice as to certificates for execution, under the statute 1 Will. 4, c. 7, s. 2. *Barford v. Nelson*, 8

2. In cases of ejectment, the certificate of the Judge must, under the stat. 11 Geo. 4, c. 70, s. 38, be for *immediate* possession, or the case must take its ordinary course; but if the Judge should think that some time ought to be allowed to the defendant, he will grant a certificate for *immediate* possession, the lessor of the

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plaintiff undertaking not to enforce it for a certain time. *Doe d. Packer v. Hilliard*, 132

CHARITABLE INSTITUTION.

1. A member of a committee of management, taking an active part in the concerns of a charitable institution supported by voluntary contributions, is liable for goods furnished by a tradesman for the use of the institution, although it appear that such tradesman did not furnish them on any contract with the committee, but having at first furnished goods on the credit of an individual, who, previously to the formation of a committee, had the sole management, continued to send them in afterwards *on orders* given, as before, by the servants of the institution, without any inquiry as to who was liable to pay him. *Glenester v. Hunter*, 62

2. If a builder do work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only. *Pink v. Scudamore*, 71

CLERK.

See PARISH CLERK.

CLOTH TRADE.

Semble, that there is not any custom in the cloth trade, by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shews that he has delivered it to the seller's order in writing. *Davies v. Halton*, 69

CONFESSION. 613

COMMENCEMENT OF ACTION.

See TIME.

COMPOSITION.

1. A., being a creditor of B., had executed a composition deed, in which it was stipulated that the debt should be paid at 6s. in the pound, by promissory notes. After executing this deed, A. obtained payment from B. in full:—*Held*, that B. could not recover back the difference between the full amount and 6s. in the pound, without proving that the composition notes had been paid, or giving some evidence that would be equivalent to such proof. *Ward v. Bird*, 229

2. A. advanced 100*l.* to B. on the joint and several promissory note of B. and C., the latter at that time owing A. 65*l.* on his own account. C. failed, and, at a meeting of his creditors, A. and others entered into a resolution that C. should assign certain property for the benefit of his creditors; and that his creditors should give him a release. A., at the meeting, stated his debt to be 65*l.*, and he afterwards received a dividend on that sum; subsequently to this B. failed:—*Held*, that A. could not then sue C. on the promissory note. *Seager v. Billington*, 456

CONCORDAT.

Where parties have become bankrupt in France, but have been reinstated in their affairs by a *concordat*; it is not necessary in an action brought by them for money due to them before their bankruptcy, to prove that they have performed their part of the *concordat*, but they should shew that the action is brought with the assent of the commissioners named therein. *Orr v. Browne*, 414

CONFESSION.

1. On the trial of a prisoner, who

has made before a magistrate a voluntary confession of his guilt, previous to the conclusion of the evidence against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk; the proper course is, for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper. *Rex v. Bell*, 162

2. A prisoner, indicted for stealing two heifers, said: "I drove away two heifers from 'the World's End Drovers,'" (*i. e.* Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—*Held*, insufficient to warrant a conviction. *Rex v. Tuffs*, 167

3. A prisoner ought to be told by the magistrate, that, if he makes any statement, it may be used as evidence against him; and that he must not expect any favour if he confesses: but the magistrate ought not to dissuade him from confessing. *Rex v. Green*, 312

4. A girl, accused of poisoning, was told by her mistress, that if she did not tell all about it that night, a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not admissible in evidence. Next day, a constable was sent for, and as he was taking her to the magistrate, she said something to him, he having held out no inducement to her to do so:—*Held*, that this was receivable, as the former inducement ceased on her being put into the hands of the constable. *Rex v. Richards*, 318

5. The committing magistrate had told a prisoner, that he would do all that he could for him if he would make a disclosure; after this, the prisoner made a statement to the turnkey of the prison, who held out no in-

ducement to the prisoner to confess:—*Held*, that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution. *Rex v. Cooper*, 535

6. A man and woman being apprehended on a charge of murder, another woman, who had the female prisoner in custody, told her, that she "had better tell the truth, or it would lie upon her, and the man would go free:"—*Held*, that a declaration of the female prisoner, made to this woman afterwards, was not receivable in evidence. *Rex v. Enoch*, 539

7. A statement relating to an offence, made upon oath by a person not at the time under suspicion, is admissible in evidence against him, if he be afterwards charged with the commission of it. *Rex v. Tubby*, 530

CONSTABLE.

See FORCIBLE ENTRY, 3.—IMPRISONMENT.

CONTRA PACEM.

See INDICTMENT, 3.

CONVICTION.

See DEER.—EVIDENCE, 3.

COPYRIGHT.

See AUTHOR, 2.

CORN TRADE.

By custom in the corn market, a buyer may pay the factor upon discount within the two months which constitute the ordinary time for payment, either for his own accommodation, or that of the factor; and, therefore, where a factor stopped payment after he had received the money for corn sold, but before the expiration of the two months, it was *held*, that the principal could not sue the buyer, but must look to the factor. *Heisch v. Carrington*, 471

DETINUE.

COSTS.

See EXPENSES.—LANDLORD AND TENANT, 6.

DEER.

See PARK.

On an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 26, for killing a deer after a previous summary conviction, a conviction by two Justices of the previous offence was put in:—*Held*, that such a conviction was good. This conviction, in stating the offence, did not state the place at which it was committed; but the Justices, in awarding the distribution of the penalty, awarded it to the overseers of D. in the said county, "where the said offence was committed:"—*Held*, sufficient. *Rex v. Weale*, 131

DEPOSITIONS.

It is the duty of a magistrate to return to the Judge, not only the depositions of witnesses, but also any confession taken down as made by the prisoner; and it is no excuse for not doing so, that the confession was wanted to be sent before the Grand Jury. *Rex v. Fallows*, 508

DETINUE.

1. If A., without the authority of B., pledges his property with C., a joint action of detinue is maintainable by B. against both A. and C. Whether in such an action a verdict may be taken against one defendant only—*Quære. Garth v. Howard*, 346

2. Statements made by the shopman of a pawnbroker who is left in the shop to answer in his master's absence, can only be received in evidence in an action against the master, when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable if they relate to an advance of money not within the terms of the Pawnbrokers' Act. *Ibid.*

EJECTMENT. 615

3. If the jury, in such a case, are satisfied that B. *held out* A. as a person authorized to pledge his property for the purpose of raising money, they may find a verdict for both defendants. *Ibid.*

DISTRESS.

See LANDLORD AND TENANT, 4, 5, 7.
RECEIVER.

The carriage of A., being on the premises of B., was seized by C. for rent due by B. to his landlord, D. In an action of trover brought by A. against C., a witness proved that B. had held the premises of D. for more than a year, but that he had a lease of them:—*Held*, that the lease must be produced and given in evidence, and that B.'s acquiescence in the distress would not dispense with such proof. *Shepherd v. Cafe*, 418

DOG.

See PARK, 1.

1. In an action against a party for keeping a dog accustomed to bite mankind, it is not essential that the dog should be his; if he harbours the dog, or allows it to be at and resort to his premises, that is sufficient. *M'Kone v. Wood*, 1

2. In an action for not sufficiently securing a fierce dog, kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had, on a previous day, been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution. *Curtis v. Mills*, 489

DURESS.

See MACHINE BREAKING.

EJECTMENT.

See CERTIFICATE FOR EXECUTION, 2.
—LANDLORD AND TENANT, 2.—
LIMITATION, 5.

ELECTING.

A. was indicted for shooting at B., a gamekeeper; there being another indictment against A. for night poaching:—*Held*, that although both indictments related to the same transaction, yet these were offences quite distinct from each other, and that the prosecutor ought not to be put to his election to go upon one indictment and abandon the other. *Rex v. Handley*, 565

EMBEZZLEMENT.

1. A. gave his clerk 5*l.*, out of which he was to pay for an advertisement; he paid 1*l.*, but told A. he had paid 2*l.* 0*s.* 6*d.*, and accounted with A. accordingly:—*Held*, no embezzlement; and that, if in such a case the indictment, besides containing a count for embezzlement, contained a count for a larceny charged to have been committed "in manner and form aforesaid," the prisoner could not be convicted on that count. *Rex v. Murray*, 145

2. Where a party is charged with embezzlement, the Judge, before the indictment is found, will order the prosecutor to furnish the prisoner with a particular of the charges, if the prisoner make an affidavit that he does not know what the charges are, and that he has applied to the prosecutor for a particular, and it has been refused. *Rex v. Bootyman*, 300

3. The prisoner had worked for the prosecutor sometimes as a regular labourer and sometimes as a roundsman, but, at the time in question, he, not being at all in the prosecutor's service, was sent by the prosecutor to get a check cashed at a banker's, for doing which he was to be paid sixpence. He got the cash and made off:—*Held*, no embezzlement, as the prisoner was not a servant of the prosecutor within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 47. *Rex v. Freeman*, 534

EVIDENCE.

See ACCOMPLICE. — ADULTERY. — ALIEN, 2. — ATTORNEY, 6, 7. — BANKRUPT, 3, 4, 5. — BILL OF EXCHANGE, 9. — BOND. — CONFESSION. — DETINUE, 2. — FALSE REPRESENTATION, 3. — FORGERY, 2, 3, 6. — INSOLVENT, 4, 5. — LEGITIMACY, 2. — LIBEL, 4, 5. — LIEN, 1. — MACHINE BREAKING. — MANSLAUGHTER, 4. — PALACE COURT. — PAVING. — PAYMENT OF MONEY INTO COURT. — PERJURY, 2. — SEISIN.

1. Where an indictment is founded on a written instrument, and where the instrument itself is the crime, it is receivable in evidence, although not stamped; but where the indictment is for an offence distinct from the instrument, and the instrument be only introduced collaterally, it cannot be received unless it be properly stamped. *Rex v. Smyth*, 201

2. Persons who cohabit as man and wife, after a marriage *de facto*, supposed by both to be a good marriage in law, may, after the marriage is found to be a nullity, give in evidence, in a Court of justice, statements made by each other during the cohabitation. *Wells v. Fletcher*, 12

3. If a plea justifying a libel state that an information was laid before a magistrate, an examined copy of the magistrate's conviction, reciting the information, is sufficient proof of the information. *Scarth v. Gardener*, 38

4. In slander, the words imputed the prescribing of medicines in improper doses, and the defendant justified:—*Held*, that medical books, which were stated by the medical witnesses to be works of medical authority, could not be put in, to shew that such doses were sanctioned; but, that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books as a part of their general knowledge. *Collier v. Simpson*, 73

5. A. brought an action against the sheriff for a false return of *nulla bona* to a *fi. fa.* issued against the goods of B. B. had filed a bill of discovery against A., on which there had been a decree or order, that A. should bring into the Court of Chancery all letters written by B. or any other person to him respecting the original debt. A., under this decree or order, brought in various letters:—*Held*, that none of them could be read in evidence on the part of the defendant in the present action, without first putting in the bill and answer. *Hewitt v. Piggott*, 75

6. The statements in a special plea, on which judgment has been given for the plaintiff on demurrer, cannot be used at the trial of the cause as an admission on the record by the defendant; but the cause must be tried on the general issue, without any reference to the special plea at all. *Firmin v. Crucifix*, 98

7. If, in a case of felony, a witness for the prosecution is too ill to attend the assizes, this is a good ground for postponing the trial, but will not authorize the reading the deposition of the witness taken before the magistrate. *Rex v. Savage*, 143

8. A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk, on the subject of his affairs, is a privileged communication, and cannot be given in evidence in an action by his assignees, for the purpose of shewing his motives. *Bowman v. Norton*, 177

9. A witness formed his opinion of the hand-writing of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved:—*Held*, sufficient. *Smith v. Sainsbury*, 196

10. A witness is not only not bound to answer a question, the answer to

which would criminate him, but he is not bound to answer any question, the answer to which would *tend* to criminate him. A witness is, therefore, not bound to answer whether he wrote an advertisement referring to libellous letters which the prosecutor had received; and, though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself.

Rex v. Slaney, 213

11. A clerk who has seen numerous letters addressed by a party to his employer, and has acted on those letters, may prove the handwriting of such party. *Ibid.*

12. An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard it was asked if the prosecutor had not received certain warning. The prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard if he had not received the letters:—*Held*, that the letters might be read in evidence as explanatory of the placard, without proof of the handwriting of them. *Ibid.*

13. The statements in a special plea, which has been holden bad on demurrer, are not evidence for the plaintiff on the general issue, although the jury are to assess damages as well as to try the case on the general issue. *Montgomery v. Richardson*, 247

14. Any evidence that is a confirmation of the original case cannot be given as evidence in reply; and the only evidence that can be given in reply, is that which goes to cut down the defence without being any confirmation of the original case. *Rex v. Hilditch*, 299

15. Where the examination on interrogatories of an absent witness is read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. *Temperley v. Scott*, 341

16. A witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion; as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause. *Elton v. Larkins*, 385

17. Written admissions made for the purpose of a former trial may be used on a new trial. If the party who made them wishes to withdraw them, he should take out a summons before a Judge, in order to obtain his permission. *Ibid.*

18. If the clerk of an attorney has the management of a cause, what he says is receivable in evidence, the same as if it had been said by the attorney himself. *Standage v. Creighton*, 406

19. A debtor, being in prison, wrote to the town agents of his creditors' attornies, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claim:—*Held*, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter, was receivable in evidence, even though the subject-matter of the communication was an offer of 10s. in the pound. *Hill v. Elliott*, 436

20. A witness for the defence cannot be asked whether he has heard a witness for the prosecution commit perjury on the trial of a cause; and, in stating whether he would believe that witness on his oath, he must do so from his knowledge of the witness's

general character, and not from having heard him give particular evidence on a particular trial. *Rex v. Hemp*, 468

21. The minute book of a Court of Quarter Sessions is not evidence of its proceedings. The record should be made up on parchment, and an examined copy produced by a witness who examined it. *Rex v. Thring*, 507

22. On the trial of an indictment for arson, a witness for the prosecution was himself in custody on a charge of felony. The counsel for the prisoner wished to ask him, "Have you not said that you committed the offence for which you are now in custody?"—*Held*, that this question ought not to be put. *Rex v. Pegler*, 521

23. What a party says is evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper. *Earle v. Picken*, 542

24. The counsel for the prosecution opened that he should call A. and B. as witnesses, the former being a King's evidence. Both before and after those persons were called the prisoner's counsel were allowed to ask the other witnesses, whether A. and B. were not persons of very bad character. *Rex v. Nichols*, 600

EXPENSES.

1. On the trial of an indictment for manslaughter, the surgeon will only be allowed for his attendance on the trial, and not for his fee for opening the body by order of the coroner. *Rex v. Taylor*, 301

2. The Judge, on a trial for murder, has no power to allow the expenses of the witnesses for their attendance at the coroner's inquest. *Rex v. Rees*, 302

3. A prosecutor and his witnesses were bound by recognizances to prosecute and give evidence at the assizes. They attended there, and preferred an indictment, which was found. The prisoner had been by mistake dis-

charged by proclamation at an adjourned sessions which preceded the assizes, and had absconded. The Judge allowed the expenses. But *semble*, that, if the prosecutor and witnesses had merely appeared at the assizes and had not preferred any indictment, the Judge would have had no power to allow any expenses. *Rex v. Robey*, 552

FALSE PRETENCE.

See FORGERY, 7.

FALSE REPRESENTATION.

See WARRANTY.

1. A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly and immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet and ill-judging credit, he cannot make the referee answerable for any loss occasioned by it. *Corbett v. Brown*, 363

2. A party bought a ship under a representation that she was copper fastened. He ascertained in the course of a few days that she was not, but did not make any complaint to the seller till several months afterwards, when she had been on a voyage and returned:—*Held*, that this delay would not prevent his recovering, provided the action was in other respects maintainable. *Freeman v. Baker*, 475

3. *Held*, also, that “Lloyd’s Register of Shipping” was not admissible in evidence to shew that the vessel was considered as copper fastened. *Ibid.*

4. The contract stated, that the vessel was to be delivered with all her stores according to the inventory. The inventory was at the end of the advertisement for the sale:—*Held*, that this did not import into the contract the representation as to the vessel

contained in the advertisement, as the vessel itself was not mentioned in the inventory, but only the stores. *Ibid.*

5. The questions for the jury in such a case are, whether the vessel was in fact copper fastened; and, if it was not, did the seller know that it was not? and, if he did, did he use any means to conceal the fact from the buyer? *Ibid.*

FORCIBLE ENTRY.

1. An indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least such shew of force, as is calculated to prevent any resistance. *Rex v. Smyth*, 201

2. If a wife, separated from her husband, take a house of which the husband, with the landlord’s consent, obtains possession:—*Semble*, that if the wife come with others and make a forcible entry into this house, she may be convicted on an indictment for a forcible entry, stating it to be the house of the husband. *Ibid.*

3. Where a constable entered a house with a warrant in his hand, and searched it, and for such entering and searching was indicted for a forcible entry:—*Held*, that his counsel might ask the witnesses for the prosecution what the constable said at the time as to whom he was searching for. *Ibid.*

FORGERY.

1. A forged paper was in the following form—“Per bearer two 11-4 superfine counterpanes. T. Davis, E. Twell.” It was not addressed to any person:—*Held*, by the 15 Judges, that it was neither an order nor a request within the stat. 1 Will. 4, c. 66, s. 10, (the forgery consolidation act). *Rex v. Cullen*, 116

2. On an indictment for forging a check, purporting to be drawn by G. A. upon Messrs. J. L. & Co., proof

that no person named G. A. keeps an account with or has any right to draw on Messrs. J. L. & Co., is *prima facie* evidence that G. A. is a fictitious person. *Rex v. Backler*, 118

3. Where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham"—It was held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the Jury, though neither the best nor the usual evidence, given to prove the non-existence of a party whose name is used. *Rex v. King*, 123

4. The practice of issuing county court processes in blank for the attorneys to fill up after they have been issued by the county clerk, is highly irregular; and *semble*, that the filling up of a county court summons, or altering a *distringas* into a summons after it has been so issued in blank, is a forgery at common law. *Rex v. Collier*, 160

5. An indictment which charges a forged check to be "a warrant and order for the payment of money, which said warrant *and* order is in the words and figures following," is good. *Rex v. Crowther*, 316

6. A forged check on the W. bank was presented for payment at the S. bank, where the supposed drawer never kept cash:—*Held*, that this was sufficient evidence of an intent to defraud the partners of the S. bank, although there was no probability of their paying the check, even if it had been genuine. *Ibid.*

7. A person who obtained goods on delivering a forged letter—"Please to let the bearer W. T. have for J. R. 4 yards of linen," signed J. R., is not indictable for obtaining goods by false pretence, as this is uttering a forged request for the delivery of goods which is a felony under sect. 10, of the stat. 1 Will. 4, c. 66. *Rex v. Evans*, 553

GAME.

See POACHING.

1. To bring a party within the stat. 52 Geo. 3, c. 93, for not producing his game certificate, it is not necessary that the demand of it should be made *on* the land on which he was sporting; but the demand must be made so immediately after the party has left the land, as to form a part of the same transaction. *Scarth v. Gardener*, 38

2. It is not necessary that the person making the demand should produce any certificate; and if the other party refuses to produce his, he takes the risk of whether the person demanding is one having a right to make such demand. *Ibid.*

3. If a person refuses to produce his game certificate, or to tell his name or residence, the person demanding need not go on to ask in what place, if any, he is assessed to the game duty. *Ibid.*

GOODS LET ON HIRE.

See HORSE.

GOODS NOT CONFORMABLE TO CONTRACT.

Where a party contracted to supply and erect a warm air apparatus for a certain sum:—*Held*, in an action for the price, (the defence to which was, that the apparatus did not answer,) that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sum as would enable the defendant to do what was requisite. *Cutler v. Close*, 337

GOODS SOLD.

See CHARITABLE INSTITUTION.

A. sold to B. a butt of wine, which was not delivered. B. compounded with his creditors, and the amount of

HIGH TREASON.

the wine was, by A.'s consent, included in the composition. The composition money was secured by bills, and A. had a claim against B. beyond the price of the wine. Before the whole of the composition was paid, B. demanded the wine of A., who refused to deliver it:—*Held*, that he was bound to deliver it, as he had undertaken to do so; and that the doctrine with respect to stoppage *in transitu* did not apply under the circumstances. *Nichols v. Hart*, 179

2. A., a publisher, had for some years supplied a periodical work to W. as fast as the numbers came out. W. died, and A., not knowing of his death, continued sending the numbers of the work by the stage coach, addressed to W. These numbers were received by B., who had succeeded to the property of W., and there was no evidence that B. had ever offered to return them:—*Held*, that A. might maintain an action for goods sold and delivered against B., though at the time of the deliveries A. was not aware of the death of W. *Weatherby v. Banham*, 228

GUARANTIE.

A person gave a guarantie in these words, "I hereby agree to be answerable for the payment of 50*l.* for T. L. In case T. L. does not pay for the gin, &c. he receives from you, I will pay you the amount:"—*Held*, that it was not a continuing guarantie. *Nicholson v. Paget*, 395

HIGH TREASON.

1. If a true bill be found against a person for high treason, the Judge will, on the application of the counsel for the Crown, order the Sheriff to furnish the solicitor to the Treasury with a list of the persons to be summoned on the jury, that a copy of it may be delivered to the prisoner. *Rex v. Collins*, 305

2. *Semble*, that counts charging a

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party with high treason in "compassing &c. the main and wounding" of His Majesty, and with "compassing &c. the wounding" of His Majesty, are bad. *Ibid.*

3. The prisoner, in a case of high treason, has a right to address the Jury in addition to the speeches of his counsel—and *semble*, that both the prisoner's counsel have a right to address the Jury, although there be no evidence on the part of the defence. *Ibid.*

HIGHWAY.

See WAY.

A road had been repaired by a parish, and persons on horseback had used it; but there was no evidence that any carriage had ever gone along the whole length of it:—*Held*, that the parish could not be convicted of non-repair of it on an indictment stating it to be a way for carriages; and that there should have been a count in the indictment charging it to be a way for horses. *Rex v. The Inhabitants of St. Weonard's*, 579

HORSE.

A. let a horse on hire to B. for one month, B. kept it for two months, and then sold it to C.:—*Held*, that A. might recover the value of the horse from C., although C. had acted *bonâ fide*, and had paid B. the full value. *Shelley v. Ford*, 313

HORSE RACE.

1. The clerk of the course at a race cannot set off a claim of an unpaid stake due from the plaintiff on one race against a stake of another race won by the plaintiff's horse. *Charlton v. Hill*, 147

2. The clerk of the course at a race cannot bring actions for unpaid stakes. *Ibid.*

HUSBAND AND WIFE.

See EVIDENCE, 1, 2.—LEGITIMACY.

1. To make a husband liable for

his wife's board and lodging at the house of a third person, when the wife leaves in consequence of a dispute, it must be shewn, either that his conduct rendered it improper for her to live with him, or that he knew where she was residing, and did not make any offer to take her back, except upon conditions which he had no right to make. *Reed v. Moore*, 200

2. A man is answerable to a third person for what is done by his wife, so long as the relation of husband and wife continues, though they may be permanently living apart; at least, if it be not shewn that the wife at the time was living in adultery. *Head v. Briscoe*, 484

IMPRISONMENT.

A woman died after a very short illness; rumours were generally in circulation in the neighbourhood where she had lived that her husband had poisoned her, and a great crowd was collected in front of his house; upon which the constable of the parish, without any warrant, took him into custody, and conveyed him before a magistrate, who detained him till medical men had reported the cause of death, and then discharged him:—*Held*, that, if the Jury were of opinion that the constable had reasonable ground of suspicion to justify the apprehension, the action could not be maintained. *Nicholson v. Hardwick*, 495

INDICTMENT.

See LARCENY, 1.—MANSLAUGHTER, 1, 2, 3, 7.—MURDER, 2, 3, 5.—POACHING.—RIOT ACT.

1. Where an indictment is tried at *Nisi Prius*, the *nisi prius* record does not shew what names were on the back of the indictment. *Rex v. Smyth*, 201

2. On an indictment for felony, a matter, which was the subject of another indictment for felony, was ma-

terial to be given in evidence, as it formed a part of the facts of the case. The Judge received the evidence, and did not direct the second prosecution to be abandoned. *Rex v. Salisbury*, 155

3. An indictment preferred in 2 Will. 4, for a felony committed on the 12th of March, 1830, charged the offence to have been "against the peace of our Lord the King." This was objected to as soon as the case for the prosecution had closed. The prisoner was convicted, and the fifteen Judges held the conviction right. *Rex v. Chalmers*, 331

4. In an indictment the property was laid in J. H. It appeared that the prosecutor's name was J. W. H.:—*Held*, not material, if he was generally known by the name of J. H. *Rex v. Berriman*, 601

INSANITY.

To justify the acquittal of a prisoner indicted for murder on the ground of insanity, the Jury must be satisfied that he was incapable of judging between right and wrong, and at the time of committing the act did not consider that it was an offence against the laws of God and nature. *Rex v. Offord*, 168

INSOLVENT.

See RELEASE.

1. An insolvent debtor, omitting to state in his schedule debts due to him, is not indictable for perjury, although he has sworn to the truth of his schedule; but he must be indicted for a misdemeanor, under sect. 70 of the insolvent debtors' act, 7 Geo. 4, c. 57. Perjury under sect. 71 of that act is only committed as to things falsely stated in the schedule. *Rex v. Moody*, 23

2. The form of oath at the end of an insolvent's schedule is an affidavit in writing, and may be so stated in an indictment for perjury. *Ibid.*

3. Debts due to the insolvent are "effects or property," within sect. 70 of the insolvent debtors' act. *Ibid.*

4. In an action by the assignee of an insolvent, it is necessary to prove the provisional assignment, although, by the Insolvent Debtors' Act, 7 Geo. 4, c. 57, it must be executed at the time of signing the petition, on which the adjudication of the Insolvent Debtors' Court (which is a court of record) is founded. *Jeffery v. Robinson*, 230

5. In an action by the assignee of an insolvent, a letter written by the defendant was given in evidence; on the back of it something had been written by the insolvent:—*Held*, that the defendant's counsel were entitled to have it read. *Dagleish v. Dodd*, 238

6. If an insolvent knows at the time of filing his schedule that a bill of exchange had been indorsed to a particular person some time before, he is bound to give notice to that person, although he cannot tell whether he continues to be holder at the time of filing the schedule. *Pugh v. Hookham*, 376

7. A. received from B., an insolvent, the pawnbroker's duplicate of a harp, which was an undue preference under sect. 32 of the Insolvent Act, 7 Geo. 4, c. 57. A. took the harp out of pawn:—*Held*, that, as against the assignees, A. had no lien on the harp for the sum he paid to take it out of pawn. *Ayling v. Williams*, 399

8. *Semble*, that, where a party claims to hold goods for his general balance, he cannot object that a smaller sum, for which he really has a lien, has not been tendered to him. *Ibid.*

INSURANCE.

See PRINCIPAL AND AGENT.

1. It is not necessary, to defeat an action on a policy of insurance on a ship, on the ground of concealment of material facts, that *fraud* should be

made out; but it is enough, if the information be withheld, although the party withholding may only have *erred* in judgment. *Elton v. Larkins*, 86

2. In general, it is not necessary that the assured should communicate the time of sailing; yet, if it be such as to make the ship a missing ship, then it becomes a material fact, and should be communicated. *Ibid.*

3. Whether underwriters at Lloyd's must be taken, under all circumstances, with reference to insurances, to be cognizant of the contents of the foreign lists filed in the reading room there—*Quære*. *Ibid.*

4. In a question of marine insurance, a material concealment is a concealment of facts, which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a larger premium than the ordinary premium; and a letter containing facts, which, if communicated, would lead to inquiry, which would produce important information, ought to be shewn by the assured to the underwriter. *Elton v. Larkins*, 385

5. A party is not bound, at the time of effecting a policy, to communicate the time of sailing of the ship, unless at that time it is a missing ship; neither is he bound to communicate any knowledge he may have of the time of sailing of another vessel from the same place, either before or at the same time as his own, unless he knows of something particular having happened to such other vessel, which might affect the insurance of his own. *Ibid.*

6. Where material facts are known to the assured at the time of effecting a policy, he is bound to communicate them; and the circumstance of their being contained in what are called Lloyd's Lists, which the underwriter has the power of inspecting, will not dispense with the necessity of such communication. *Ibid.*

INTEREST.

Interest cannot be recovered on money had and received, or money paid, without a special agreement; but, if money was at first had and received, and there is a subsequent agreement to pay interest, the plaintiff may recover such money and interest on a count for money had and received, and on a count for interest, and need not declare specially. *Hicks v. Mareco*, 438

JURY.

On the trial at bar of an information, the Special Jury were summoned from a distant county, in which the offence was not charged to have been committed:—*Held*, that the Court had no power to order their expenses to be paid. The Jurors who tried this information were only paid one guinea each, and other Jurors who had come from the same county, and had been summoned to try another information, which was not tried, were not paid any thing. *Rex v. Pinney*, 254

JUSTICE OF THE PEACE.

See MAGISTRATE.

LANDLORD AND TENANT.

See DISTRESS.

1. A., the landlord of premises, sued B. as assignee of a lease, for rent due, with a count for use and occupation. At the trial, A. put in the lease, which was a lease to W., who had taken the benefit of the Insolvent Debtors' Act. It was proved that B. had occupied the premises, and had treated A. as landlord, and had paid rent to him; but that the lease had never been assigned:—*Held*, that A. could not recover against B., either for the rent or for the use and occupation. *Hyde v. Moakes*, 42

2. In ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, the 4th of August.

The witness who was called to prove that Wednesday was the expiration of the current week of the tenancy, said, "that he guessed" the defendant came in "about a Tuesday or a Wednesday, but had no recollection which:—*Held*, insufficient. *Doe v. Bayley*, 67

3. A tenant from year to year of a house is only bound to keep it wind and water tight. A tenant, who covenants to repair, is to sustain and uphold the premises; but that is not so with a tenant from year to year. *Auworth v. Johnson*, 239

4. A., a tenant, owed rent to B., his landlord; B. distrained for more rent than was due, and removed the goods to the auction rooms of C.; A. gave C. notice not to sell, and C. delivered the goods back to the person from whom he received them:—*Held*, that, as some rent was due from A. to B., C. was not liable to A. in an action of trover. *Whitworth v. Smith*, 250

5. In case for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage. *Knotts v. Curtis*, 322

6. A. rented land of B., who was trustee of certain property, a part of which was this land, the rents of which B. was to pay in certain shares; one of these shares belonged to the wife of A. B. had in his hands a greater amount due to A. in right of his wife, than the rent amounted to:—*Held*, that this could not be set off against the rent, without a special agreement to that effect. *Willson v. Davenport*, 531

In replevin, a defendant avowed, for rent payable yearly, for rent payable half-yearly, and for rent payable quarterly, and to each of these avowries the plaintiff pleaded *non tenuit*, and *riens in arrear*. A holding at a rent payable half-yearly was proved, and half a year's rent to be due, and the jury were directed to find for the plaintiff on the first and fifth is-

ques, for the defendant on the third and fourth, and the jury were discharged on the second and sixth issues. *Ibid.*

7. Upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew that the goods were allowed to stand in the rain, and that they were improperly lotted. *Poynter v. Buckley*, 512

LARCENY.

See POST OFFICE.

1. An indictment for stealing a bank-note did not conclude *contra formam statuti*:—*Held*, by the 15 Judges, that it was bad. *Rex v. Pearson*, 121

2. A. went to the shop of B., and asked for shawls for Mrs. D. to look at; B. gave her five; she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness:—

Held, that A., on this evidence, could not be convicted of a larceny in stealing the goods of B. *Rex v. Savage*, 143

3. A. had consigned three trusses of hay to B., and had sent them by the prisoner's cart; the prisoner took away one of the trusses, which was found in his stable, but not broken up:—*Held*, no larceny, as the prisoner did not break up the truss. *Rex v. Pratley*, 533

4. A bible had been given to a society of Wesleyans, and it had been bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust deed was produced:—*Held*, that, in an indictment for stealing the bible, the property was rightly laid in B. and others. *Rex v. Boulton*, 537

5. If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him, it is not felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of. *Rex v. Holloway*, 524

LEGITIMACY.

1. If a husband have access, and others at the same period have a criminal intimacy with his wife, and she have a child, such child is legitimate; but, if the husband and wife live separately, and the wife is notoriously living in adultery, a child born under such circumstances would be illegitimate, although the husband had an opportunity of access. *Cope v. Cope*, 604

2. On the trial of an issue, in which the question is, whether A. is the legitimate son of B., neither the declaration of B., nor of his wife, the mother of A., are receivable to shew that A. is illegitimate. *Ibid.*

LIBEL.

See EVIDENCE, 3, 4, 10, 11, 12.—
SLANDER.

1. The declaration in an action for libel alleged that the plaintiff was a good and faithful subject, &c., and that he was a *medical practitioner*, and stated the libel to have been published of and concerning him, and of and concerning him in *his said practice*. No evidence was given of any licence or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "Physician extraordinary to several ladies of distinction," and "doctor, or rather quack:"—*Held*, that this did not withdraw the claim to damages in the medical capacity from the consideration of the jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character. *Long v. Chubb*, 55

2. Every wilful unauthorized publication, injurious to the character of another, is a libel; but, where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of that other, that which he writes, under

such circumstances, is a privileged communication; and no action will lie for what is thus written, unless the writer be actuated by malice. *Cockayne v. Hodgkisson*, 543

3. A., being a tenant of B., was desired by B. to inform him if he saw or heard anything respecting the game. A. wrote a letter to B., informing B. that his gamekeeper sold game:—*Held*, that, if A. had been so informed, and believed the fact to be so, this was a privileged communication, and that the gamekeeper could not maintain any action for a libel. *Ibid*.

4. In such a case the defendant may give in evidence representations made to him as to the conduct of the gamekeeper, but cannot go into evidence of the acts done by the gamekeeper. *Ibid*.

5. Libel, imputing that the plaintiff had received rose wood, knowing it to have been stolen. Pleas of justification, stating that B. had stolen the rose wood from A., and that the plaintiff had received it, knowing it to have been stolen:—*Held*, that the defendant's counsel might ask what B. said, with a view of proving that B. committed the larceny; and *held*, also, that the plaintiff's counsel might ask the defendant's witnesses, what was the plaintiff's general character for honesty. *Powell v. Harper*, 590

LIEN.

See INSOLVENT, 8.—STAGE COACH, 1.

1. A person's having a lien upon a document is no objection to his producing it on a trial at *Nisi Prius*; but, if he fears that it may be abstracted, the Judge will allow him to stand by the witness while the witness is examined respecting it. *Thompson v. Mosely*, 501

2. A. was desired by B. to go to a pawnbroker, and take goods of B. out of pledge. A. did so; but, on B. sending to A. for the goods, A. said

LIMITATION.

he had not got them, and refused to tell who had:—*Held*, that if, after this, trover was brought against A., he could not insist on a lien on the goods for the money he had advanced to get the goods out of pledge. *Jones v. Cliff*, 560

LIGHTS.

See BUILDING ACT, 1.

That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them, to a sensible degree, less fit for the purposes of business or occupation. *Parker v. Smith*, 438

LIMITATION.

1. If, since the stat. 9 Geo. 4, c. 14, a defendant by a letter admit a balance to be due, without stating the amount, this will take the case out of the statute of limitations, so as to entitle the plaintiff to nominal damages. *Dickenson v. Hatfield*, 46

2. The object of the stat. 9 Geo. 4, c. 14, was to procure that in writing for which words were previously sufficient. *Ibid*.

3. A letter, stating that an appointment of funds to pay a debt due from the defendant to the plaintiff had been made, and that Mr. Y. was one of the trustees, but that some time must elapse before the trustees would be in cash, will not take the case out of the statute of limitations, as it is at most only a promise to pay as soon as the trustees are in cash. But, *semble*, that the creditor's remedy would be by a bill in equity against the trustees. *Whippy v. Hillary*, 209

4. A defendant had written a letter to T., to make a proposition to the plaintiff respecting a debt he owed him; and in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to the plaintiff, offering an acceptance for 7s. 6d. in the pound on the debt:—*Held*,

not sufficient to take the case out of the statute of limitations. *Gibson v. Baghott*, 211

5. A., who was tenant for life, with a power of appointment by will attested by three credible witnesses, by his will attested by three witnesses appointed the lands to B. for life, and after her death to C. in fee. B. was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B. entered, and held the land till his death, which was three years after the death of B.:—*Held*, that the statute of limitations did not begin to run against C. till the death of B. *Doe d. Allen v. Blakeway*, 563

MACHINE BREAKING.

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 4, for breaking a threshing machine, the Judge allowed a witness to be asked whether the mob by whom the machine was broken did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. *Rex v. Crutchley*. 133

MAGISTRATE.

1. The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and all the king's subjects are bound to do so, upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so. *Rex v. Pinney*, 254

2. It is no part of the duty of a

magistrate to go out and head the constables, neither is it any part of his duty to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men, as a reserve, to act as occasion may require. Neither is he bound to call out the Chelsea pensioners, any more than the rest of the king's subjects; nor is it any part of his duty to give any orders respecting the fire-arms in the gunsmiths' shops. Nor is a magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that is required of him. *Ibid.*

3. Mere good feeling and upright intention in a magistrate will be no defence, if he has been guilty of a neglect of his duty. Nor will the fact of his having acted under the advice of others be any defence for him. The question is, whether he did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness, and activity. *Ibid.*

4. On the trial of a magistrate for neglect of duty, he ought not to be found guilty, unless all the Jury are satisfied that he has been guilty of the same act of neglect; and if four jurors think him guilty of one act of neglect, and eight think him guilty of another act of neglect, that is not sufficient. *Ibid.*

5. A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. At the time of a riot, a magistrate may repel force by force, before the reading of the proclamation from the Riot Act. *Rex v. Kennett*, 282, n.

6. If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes

any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather than apprehend the rioters, his sole care was for himself, this is also neglect. *Ibid.*

MALICIOUSLY SUING OUT A COMMISSION OF BANKRUPT.

In an action for maliciously suing out a commission of bankrupt, it is not sufficient to prove merely that the commission was superseded, as a *supersedeas* may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay v. Weakley*, 361

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution against A. and B., if it appear that both A. and B. entered into a joint recognizance to *prosecute* and give evidence, but it also appear that A. only employed the attorney, and that B. attended before the magistrate and the Grand Jury at the request of the attorney, the Judge will direct the acquittal of B. *Eager v. Dyott*, 4

2. If C. be entrusted to receive money for A., with a written direction for its application, and C. write a letter to A. stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under the statute 7 & 8 Geo. 4, c. 29, s. 49, not malicious. *Ibid.*

MANSLAUGHTER.

See L. C. J. TINDAL'S CHARGE, p. 267, n.

1. A. was indicted for the manslaughter of B., by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle

between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—*Held*, that, if it was occasioned by a blow with a hammer or any other hard substance held in the hand, it was sufficient to support the indictment; but otherwise, if it was the result of a push against the door. *Rex v. Martin*, 128

2. An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened, and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him; whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed:—*Held*, that this evidence sufficiently supported the indictment. *R. v. Hickman*, 151

3. An indictment for manslaughter charged that A. gave to the deceased divers mortal blows at P., in the county of M., and that the deceased languished and died at D. in the county of K.; and that the prisoner was *then and there* aiding in the commission of the felony:—*Held*, that the indictment was good, and that the word *there* referred to P., in the county of M. *Rex v. Hargrave*, 170

4. Although all persons present at and sanctioning a prize fight, where one of the combatants is killed, are guilty of manslaughter, as principals in the second degree; yet they are not such accomplices as to require their evidence to be confirmed, if they are called as witnesses against other parties charged with the manslaughter. *Ib.*

5. It is not every slight *provocation*, even by a blow, which will, when

the party receiving it strikes with a deadly weapon and death ensues, reduce the crime from murder to manslaughter. *Rex v. Lynch*, 324

6. Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill; and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter. *Rex v. Spiller*, 333

7. An allegation in an indictment, charging that the death of a person was caused by a plaster made and applied by the prisoner, is sufficiently proved, by shewing that three plasters were applied, and that two of them were applied by the prisoner, and the third made from materials furnished by the prisoner. *Ibid.*

MASTER AND SERVANT.

A baker delivered bread from week to week, and was paid many sums by the housekeeper of his customer, and receipted weekly bills for a period of time subsequent to a time for which the housekeeper had not paid him:—*Held*, in an action by him to recover from his customer the amount of the unpaid bills, that the question of negligence was not raised, and that the plaintiff was entitled to the verdict, as the defendant did not prove that he had given the housekeeper money for the purpose of paying the bills in question. *Miller v. Hamilton*, 433

MEDICAL PRACTITIONER.

See MANSLAUGHTER, 6, 7.

MONEY LENT.

A clerk in a house lent money to the partnership composing it, two of them signed an acknowledgment for it, agreeing to pay 5*l.* per cent. interest. Various changes took place in the house, in the course of which one

of the parties who signed the acknowledgment retired from it. The interest was paid from time to time by the different firms, till the last became bankrupt. The clerk continued to serve all the different firms, and was cognizant of the different changes:—*Held*, that he might, notwithstanding, recover the money he had advanced from the two persons who signed the acknowledgment. *Blen v. Wyatt*, 397

MURDER.

See MANSLAUGHTER.

1. A. was fighting with his brother; and to prevent this B. laid hold of A., and held him down upon a locker on board the barge in which they were, but struck no blow. A. stabbed B.:—*Held*, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of this stab, the offence of A. would have been murder; but that, if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only. *Rex v. Bourne*, 120

2. A. was charged with suffocating B. by placing both her hands about the neck of B.:—*Held*, that A. might be convicted on this indictment if B. was suffocated in any manner, either by A. or by any other person in her presence, she being privy to the commission of the offence. *Rex v. Culkin*, 121

3. The phrase "about the neck," in an indictment for murder, is good, and is not open to the same objection as "about the breast." *Ibid.*

4. To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which *was born alive*, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth. *Rex v. Poulton*, 329

5. Where the indictment in such a case states the child to have been born a *bastard*, the proof that it was so, lies on the prosecutor; but evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had *lately got married*, was held to be sufficient proof of the allegation. *Ibid.*

6. If a child has breathed before it is born, this is not sufficiently life to make the killing of the child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose. *Rex v. Enoch*, 539

NEGLECT OF DUTY.

See MAGISTRATE.

NEGLIGENCE.

1. A booking-office keeper, who also keeps a wine vaults, is guilty of negligence, if he allows goods to remain in front of the bar, exposed to persons coming in for liquor, even though they are of too large a size to be *conveniently* taken behind the counter. *Dover v. Mills*, 175

2. If a horse and cart are left standing in the street, without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer by, in striking the horse. *Illidge v. Goodwin*, 190

3. A person driving a carriage is not bound to keep on the regular side of the road; but, if he does not, he must use more care, and keep a better look-out, to avoid concussion, than would be necessary if he were on the proper part of the road. *Plucknell v. Wilson*, 375

4. A foot-passenger, though he may be infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. *Boss v. Litton*, 407

NOTICE TO PRODUCE.

5. In an action of trespass for injury done to a horse by a pony and chaise running against it, it was sworn, on the part of the defendant, that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, who ran off with the chaise:—*Held*, that, if true, this was a good defence on a plea of not guilty. *Goodman v. Taylor*, 410

6. In an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell *alone*: and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained, by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant. *Luxford v. Large*, 421

7. In an action for the negligent driving the defendant's carriage against that of the plaintiff, the plaintiff cannot examine his servant who drove his carriage, without releasing him. *Wake v. Lock*, 454

NEW ASSIGNMENT.

A replication of *de injuriâ* in trespass, with a new assignment that the defendant committed the trespasses with more violence and in a greater degree than was necessary for the purposes in the plea mentioned, is demurrable. *Thomas v. Marsh*, 596

NOTICE TO PRODUCE.

See ARSON, 2.

1. A cause came on to be tried at the Assizes on a Wednesday morning; on the previous Monday evening, the defendant's attorney, being at the assize town, was served with a notice to produce a book, which would probably be at his office, which was nineteen miles from the assize town:—*Held*,

that this service was too late. *Hargest v. Fothergill*, 303

2. A notice to produce served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late. *Houseman v. Roberts*, 394

3. Notices to produce ought to be served on the attorney, if there be one. *Ibid.*

OUT-HOUSE.

A building had been built for an oven to bake bricks, but afterwards was roofed, and a door put to it. In this place, the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor, nor the person of whom he rented this building, had any house or farm-yard near it, nor did any wall connect it with any dwelling-house, the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord:—*Held*, that the building was neither a stable nor an out-house, and that, if a person set it on fire (the lean-to not being burnt) he was not indictable for arson. *Rex v. Haughton*, 555

PALACE COURT.

See ATTORNEY, 5.

On a trial at Nisi Prius, evidence that the cause was originally commenced in the Palace Court, and that the defendant let judgment go by default in that Court, and afterwards removed the cause by *hab. corp.*, is admissible. *Tidmas v. Lees*, 233

PARISH CLERK.

After the great fire of London, in 1666, the parish of St. Mary Colechurch, was united with that of St. Mildred the Virgin, by stat. 22 Car. 2, c.11. By custom, in each of the parishes before their union, the right of appointment to the office of parish

clerk was in the rector and parishioners. In the year 1831, the parishioners of the united parishes in vestry assembled elected a parish clerk, but the rector at first refused to sanction the appointment, and himself appointed another person: afterwards, however, he appointed the person elected by the assent of the parishioners. But the person whom he had previously appointed, one Sunday morning placed himself in the clerk's desk in the church of the united parishes, and, refusing to retire upon request, was laid hold of by one of the churchwardens and the vestry clerk, and an attempt was made to remove him by force, but which was not successful. For the purpose of trying the right to the office, he brought an action of assault against these officers, who pleaded specially two sets of justifications; one set alleging the legal appointment of the person elected by the parishioners, to place whom in the desk they sought to remove the plaintiff; and the other set treating the plaintiff himself as an intruder. The jury were of opinion that the custom was for the rector to appoint, with the assent of the parishioners, and found a verdict for the defendants. A rule was afterwards obtained for a new trial, which, after argument and time taken to consider, was discharged, the Court being of opinion that the plaintiff was not lawful parish clerk, as he was appointed by the rector alone, without the concurrence of either of the parishes; but they did not decide whether the election by the united vestries was right or not, though they said that it appeared to be the natural mode. In the course of the trial, it was ruled that old entries in the vestry books of the parishes were not evidence to show the right of election, as it did not appear whether the incumbent was present at the meetings they related to. But extracts from the re-

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gister of the bishop of the diocese were received in evidence to prove the same appointments, as were also several entries of vestry meetings at which the rector was present. *Hartley v. Cooke*, 441

PARK.

The servant of an owner of an ancient park may justify shooting a dog that is chasing the deer, although such shooting may not be absolutely necessary for the preservation of the deer; and the servant may justify the shooting, although the dog may not have been chasing the deer at the moment when it was shot, if the chasing of the deer and the shooting of the dog were all one and the same transaction. *Protheroe v. Mathews*, 581

PARTICULAR OF DEMAND.

It will not prevent a plaintiff from giving evidence on a *special* count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. *Day v. Davies*, 340

PAVING.

By the stat 57 Geo. 3, c. 29, s. 114, the commissioners of paving of the metropolis are to enter their proceedings in a book, and such entries are made evidence. Whether an entry stating that A. sent a letter to the commissioners, asking their permission to erect a rail at the side of the street, is evidence of such asking permission—*Quære. British Museum v. Finnis*, 460

PAYMENT OF MONEY INTO COURT.

Payment of money into Court in *assumpsit* on the common counts for work and labour, is an admission that the contract was with the party suing, where it appears that there was in fact only one contract. *Walker v. Rawson*, 486

POSSESSION.

PERJURY.

See *INSOLVENT*, 1, 2, 3.

1. If an indictment for perjury contain several assignments of perjury, on one of which no evidence is given on the part of the prosecution.—The defendant cannot go into proof to shew that the evidence charged by that assignment of perjury to be false, was in reality true. *Rex v. Hemp*, 468

2. On the trial of an indictment for perjury, the witnesses to character were asked "What is the character of the defendant for veracity and honor?"—and "Do you consider him a man likely to commit perjury." *Ibid.*

PLEADING.

See *BILL OF EXCHANGE*, 7.—*BOND*, 1.—*CARRIER*, 1.—*INDICTMENT*.—*NEW ASSIGNMENT*.

POACHING.

1. "A certain cover in the parish of A." is too general a description to sustain an indictment for poaching, under the stat. 9 Geo. 4, c. 69. *Rex v. Crick*, 508

2. A count in an indictment for night-poaching stated, that the prisoners were in a field called A., for the purpose of then and there taking game:—*Held*, that the prisoners could not be convicted on that count, unless the Jury were satisfied that the prisoners had an intention of taking game in that particular field. *Rex v. Capewell*, 549

3. A count for night poaching may be joined with a count in sect. 2 of the stat. 9 Geo. 4, c. 69, for assaulting a game-keeper authorized to apprehend, and with counts for assaulting a game-keeper in the execution of his duty, and for a common assault. *Rex v. Finacane*, 551

POSSESSION.

See *SHIRE HALL*.

PRACTICE.

POST OFFICE.

1. S. was employed by a post-mistress to carry letters from Dursley to Berkeley, at a weekly salary paid him by the post-mistress, but which was repaid to her by the post-office:—*Held*, that S. was a person employed by the post-office, within the stat. 52 Geo. 3, c. 143, s. 2. But a letter sent from Cardiff to Dudley, and which, it was alleged, was mis-sent to Dursley, if stolen by S., would not be a letter which came to his hands "in consequence of his employment." *Rex v. Salisbury*, 155

2. *Semble*—That the words, "whilst employed," in sect. 2 of the stat. 52 Geo. 3, c. 143, relative to stealing letters, merely mean that the party should be then in the employ of the post-office; and not that the letter, when stolen, was in the party's hands in the course of his duty. *Ibid.*

POSTPONING TRIAL.

The Judge at the assizes will not postpone the trial at the instance of the plaintiff, on the ground of the illness of a material witness, as the plaintiff can withdraw his record. *Maspero v. Strachan*, 514

PRACTICE.

See CERTIFICATE.—ELECTING.—NOTICE TO PRODUCE.—PARTICULAR OF DEMAND.—PAYMENT OF MONEY INTO COURT.—POSTPONING TRIAL.—REPLY.

1. The plaintiff's counsel has a right to begin and state the facts, although, by a rule of Court, the defendant is under obligation to admit the plaintiff's case. *Thwaites v. Sainsbury*, 69

2. A counsel for the prosecution, on opening a case of felony, has in strictness a right to state in his own way a conversation supposed to have passed between the prisoner and a

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witness whom he intends to call; but, in correct practice, the statement ought to be confined to the *general effect* of the conversation. *Rex v. Deering*, 165

3. A person indicted with others for an offence, but against whom the bill has been thrown out, may, if he be in custody at the time of the trial of the others, be placed at the bar to be identified as one who was in their company. *Ibid.*

4. If a letter be shewn to a witness for the defendant, on the *voire dire*, to make out that he has an interest, and the witness be released and examined, the Judge will not prevent the plaintiff's counsel from observing on this letter in his reply. *Paul v. White*, 237

5. A counsel, to whom a retainer in a cause has been given, no brief having been delivered, cannot withdraw the record. *Doe d. Crake v. Brown*, 315

6. Observations made by a wife to her husband upon a subject, which afterwards becomes matter of criminal charge against him, and to which he gave no direct reply, may be opened to the jury by the counsel for the prosecution. *Rex v. Smithies*, 332

7. Rule as to remanets in C.P. 440

PRINCIPAL AND ACCESSARY.

See ACCESSARY.

PRINCIPAL AND AGENT.

See BRIBERY.—DETINUE.

A memorandum indorsed on a ship's policy of insurance for a change of voyage, was signed by an agent of the insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the com-

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pany:—*Held*, that this was sufficient proof of the agent's authority to sign such memorandums; and that the other policies, on which such memorandums had been signed, need not be produced. *Brockelbank v. Sugrue*, 21

PRIVILEGED COMMUNICATION.

See ATTORNEY, 6, 7.—EVIDENCE, 8.
—LIBEL, 2, 3, 4.—SLANDER.

PRIZE FIGHT.

See MANSLAUGHTER.

PROMOTIONS, 1, 435, 606.

RAPE.

1. Where on a charge of rape the jury found that there had been penetration, but that there had been no emission from the prisoner, the fifteen Judges held, that the prisoner was rightly convicted of the rape. *Rex v. Cox*, 297

2. On an indictment for carnally knowing and abusing a female child under ten years of age, the best evidence of the age of the child ought to be produced. Where an offence of this kind was committed on the 5th of February, 1832, and the child's father proved, that, on his return after an absence from home of a few days, on the 9th of Feb., 1822, he found that the child had been born, and was told by her grandmother that she had been born the day before; and the register of baptisms shewed that the child had been baptized on the 9th of February, 1822: it was held not sufficient to prove that the child was under ten years old. *Rex v. Wedge*, 298

3. If, in a case of rape, there has not been sufficient penetration to rupture the hymen, the offence is not complete. *Rex v. Gammon*, 321

RECEIVER.

A receiver, appointed by the Court of Chancery, has a right to distrain

REWARD.

for rent, without any special authority from the Court for that purpose. *Bennett v. Robins*, 379

RELEASE.

See NEGLIGENCE, 7.

1. A., having a cause of action against B., is discharged under the Lords' act, but does not execute any assignment, alleging that he has no property. After his discharge, he gives B. a release: this release is good; and therefore, if in an action by A. against C., it appear that A. might sue B., if he did not recover against C., A. may, notwithstanding this discharge, release B. and make him a competent witness. *Briant v. Eicke*, 44

2. A defendant executed a release to a witness; but, before it was given to the witness, it was handed to the counsel on the opposite side for his inspection. He objected to the form of it, and it was altered, and the defendant re-executed it:—*Held*, that it was sufficient, and that it did not require a new stamp. *Allen v. Farren*, 513

REPAIRS.

See LANDLORD AND TENANT, 3.

REPLY.

See PRACTICE, 1.

RETAINER.

See PRACTICE, 5.

REWARD.

A. published a handbill, offering a reward to any person who would give such information as would lead to the discovery of the murder of B. C. knowing of this handbill, gave the information:—*Held*, that C. was entitled to the reward, although it was found by the jury that C. did not give the information in consequence of the offered reward, but from other motives. *Held* also, that the first person who gives the

RIOTOUSLY DEMOLISHING.

information is entitled to the reward, and the motive of such person in giving the information is not material.

Williams v. Carnardine, 566

If two persons go together to give the information, they must bring a joint action for the reward. *Ibid.*

RIOT.

See MAGISTRATE.

If parties assemble together for a purpose, which, if executed, would make them rioters; but, having assembled, they do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly. *Rex v. Birt*, 154

RIOT ACT.

1. An indictment on the riot act, 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation made, need not charge the original riot to have been *in terrorem populi*. *Rex v. James*, 153

2. If an indictment on the riot act 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation, in setting out the proclamation omit the words "of the reign of," which were contained in the proclamation read by the magistrate—this is a fatal variance. *Rex v. Woolcock*, 516

3. If the proclamation be read several times, the hour is to be computed from the first reading. *Ibid.*

4. If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, this is within the statute; and whether there was a cessation or not, is a question for the jury. *Ibid.*

RIOTOUSLY DEMOLISHING.

See L. C. J. TINDAL'S CHARGE, 265, n.

An indictment on the stat. 7 & 8 Geo. 4, c. 35, s. 8, for feloniously beginning to demolish a house, cannot be supported unless the persons committing the outrage had an intention

SEISIN:

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of destroying the house; and therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house, this was held to be not within the stat. *Rex v. Price*, 510

ROBBERY.

See L. C. J. TINDAL'S CHARGE, p. 267, n.

1. A. and B. were walking together, B. carrying A.'s bundle, when C. and D. came up and assaulted A. B. threw down the bundle and ran to the assistance of A., when C. took it up and made off with it. C. and D. were indicted for robbery, A. being the prosecutor:—*Held*, that they could not be convicted of the robbery, but only of simple larceny, as the thing stolen was not in the personal custody of A. *Rex v. Fallows*. 508

2. Obtaining money from a woman by threatening to accuse her husband of an indecent assault, is not robbery. *Rex v. Edwards*. 518

3. A. was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—*Held*, robbery. *Rex v. Bingley*. 602

SEISIN.

1. A person's being assessed to the land tax for certain lands, is not evidence of his seisin of these lands. *Doe d. Stansbury v. Arkwright*, 575

2. If a person fells timber in a wood, it is *prima facie* evidence that he is the owner of it; and therefore any thing that he says at that or any other time as to any one else being the owner of it is evidence. *Ibid.*

SET OFF.

See HORSE RACE.

SHERIFF.

See BAIL, 2.

1. If a sheriff defends an action for a false return as well as he can, he may recover his costs from the sureties of his bailiff who executed the writ; though he has a verdict against him, on the ground that evidence was not produced, which, in another and subsequent suit between other parties, involving the same question, was obtained. *Farebrother v. Worsley*, 102

2. *Semble*, that, if in such an action, after he has obtained a rule *nisi* for a new trial, he compromises the suit, with the assent of *some* of the sureties, by paying a less sum for damages than would be recoverable, and a less sum for costs than were incurred—he may recover *his own costs* against the surety who did not assent, if it appears that the compromise was, under the circumstances, reasonable. *Ibid.*

3. *Semble*, also, that in such a case the words “costs of any application to the Court touching or concerning any matter, wherein the bailiff should act or assume to act as bailiff,” will comprise the costs of an application to the Court to set aside the judgment on which the execution was founded, the return to which gave rise to the action against the Sheriff. *Ibid.*

4. A sheriff had obtained judgment against A. in an action on a bail bond. On this a *fi. fa.* issued directed to the coroner. S., who was attorney for the sheriff and also for others, indorsed the name of a sheriff's officer on the writ. The coroner's broker seized a barge which was bought by B., and the price paid to the officer; subsequently, the barge was claimed by others, and B. lost his purchase:—*Held*, that under these circumstances the officer was not the agent of the sheriff so as to make the sheriff liable in an action for money had and received at the suit of B., although it was proved to be the

practice at the sheriff's office to indorse the name of the officer on the writ. *Sarjeant v. Cowan*, 492

SHIPPING.

See FALSE REPRESENTATION.

1. When a ship owner, knowing that a port is blockaded, enters into a contract with a merchant for the delivery of a cargo there, if he afterwards refuses to go, he is liable to an action for the breach of the contract; but, whether the damages are to be nominal or otherwise, must depend upon the opinion of the jury as to whether, if the vessel had gone to the place, she would have been able to get in. *De Medeiros v. Hill*, 182

2. The captain of a ship, who gives directions for repairs, is liable to the tradesman in the first instance, if it does not appear that any credit was given to the owners. *Essery v. Cobb*, 358

3. If a person, who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel. *Castle v. Duke*, 359

4. Where a vessel, bound for the East Indies, is advertised to sail by a certain day, and does not, the shipowner will be entitled to recover half the passage money of a person who refused to go, after having engaged a passage, unless either time was of the essence of the contract, or the delay in sailing was unreasonable. *Yates v. Duff*, 369

SHIRE-HALL.

1. By a private Act of Parliament, the shire-hall of G. was vested in the justices of the peace for the county, in trust to allow courts of justice to sit there, &c., and to permit and suffer it to be used for such other public purposes as a major part of the jus-

SMUGGLING.

tices in sessions should direct. The hall had always been used for the holding of the County Musical Festivals; but there was no evidence that the justices under the act directed it so to be used:—*Held*, that the stewards of one of these musical festivals had such a possession of the hall, that they might justify turning out an intruder. *Thomas v. Marsh*, 596

2. If, in answer to a plea of justification, stating that the plaintiff was intruding himself there, the plaintiff rely on his having a ticket as giving him a right to be there, he must reply that specially. *Ibid.*

SHOOTING.

See MANSLAUGHTER.—MURDER.

1. If an indictment for shooting another, with intent to murder, &c., in all the counts aver that the pistol was loaded with powder *and a leaden bullet*, it must appear that the pistol was loaded with a bullet, or the prisoner will be entitled to an acquittal. *Rex v. Hughes*, 126

2. If a pistol be loaded with gunpowder and balls, but its touch-hole be plugged, so that it cannot by possibility be fired, this is not "loaded arms," within the stat. 9 Geo. 4, c. 31, ss. 11, 12. *Rex v. Harris*, 159

SLANDER.

See EVIDENCE, 4.—LIBEL.

If a person has a communication to make to an inquest for their information, not on oath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only stating the fact for the information of the inquest, and that he did it in a proper manner. *Wilson v. Collins*, 373

SMUGGLING.

Semble, that bats, which are long poles used by smugglers to carry tubs of spirits, are not offensive weapons within the meaning of 6 Geo. 4, c. 108, s. 56. *Rex v. Noakes*, 326

STAMPS, TRANSPOSING. 637

SPIRITS.

See BILL OF EXCHANGE, 1.

STABBING.

See MANSLAUGHTER.—MURDER.—WOUNDING.

STABLE.

See outhouse.

STAGE COACH.

See CARRIER.—NEGLIGENCE.

If a person go to a coach-office, and direct that a place be booked for him by a particular coach, and that be done, and he leave his portmanteau, the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but, if the party merely leave the portmanteau while he goes to inquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all. *Higgins v. Bretherton*, 2

STAMP.

See EVIDENCE, 1.—RELEASE.

1. A bond was conditioned for the payment, on a certain day, being a year from the date, of a certain sum, with interest thereon, at the rate of 5*l.* per cent.:—*Held*, that a stamp covering the amount of the principal was sufficient. *Dixon v. Robinson*, 96

2. A bond conditioned to pay 1,000*l.* on a day five years from the date, and to pay interest, half yearly, in the mean time, only requires a stamp for the amount of the principal sum of 1,000*l.* *Foreman v. Jeyes*, 419

STAMPS, TRANSPOSING.

It was the duty of the prisoner, who was a clerk in the Stamp Office, to cut off the corners of parchments which bore the blue paper stamps allowed for as spoilt by the commissioners of stamps, and to put the blue

paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued, and glued it to a new skin of parchment, on which the words "This indenture" had been written. The Jury found, that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture:—*Held*, that this was a capital offence. And it being uncertain whether the stamp so separated was impressed before or after the passing of the stat. 55 Geo. 3, c. 184, it was held, that the party might be properly convicted on a count stating the stamp to be the impression of a die made and used "in pursuance of the statute made and provided for denoting a certain duty, being one of those under the management of the commissioners of stamps." *Rex v. Smith*, 107

STEAM VESSEL.

See NEGLIGENCE, 6.

THEATRE.

1. The 2nd section of the stat. 10 Geo. 2, c. 28, inflicting a penalty of 50*l.* on persons performing, or causing to be performed, plays, &c., without letters patent, &c., is not repealed by the stat. 5 Geo. 4, c. 83. *Parsons qui tam v. Chapman*, 33

2. Proof that a party was the acting manager of a theatre, and that he paid the salary of and dismissed one of the performers, is sufficient proof that he caused the performances; and if he caused the performances, it is not material whether he did so as the agent of others or not. *Ibid.*

TROVER.

TIME.

Assumpsit for necessities supplied to the defendant's wife. The writ was sued out in June, the declaration being in November, and the record dated in November:—*Held*, that the plaintiff might recover for things supplied up to the date of the record. *Joll v. Fisher*, 514

TREATING.

See BRIBERY.

The treating act, 7 & 8 W. 3, c. 4, only applies to candidates and their agents. *Hughes v. Marshall*, 150

TRESPASS.

See NEGLIGENCE, 5.—NEW ASSIGNMENT.

If a man employing an officer attends with the officer, who seizes in his presence the goods of a third person under an execution which he has sued out, he makes himself responsible for the officer's acts. And, *semble*, that in such a case, where he is present and interferes, he ought to point out to the officer what goods are to be taken, and what not; also, if in such a case an unjustifiable assault be committed by the officer, the party authorizing the seizure will not be answerable for it, unless it be shewn in some way to have been committed by his direction. *Meredith v. Flaxman*, 99

TRIAL.

See POSTPONING TRIAL.

TROVER.

See LIEN.

A., who was paying his addresses to a lady, lost her letters and two memorandum books containing remarks of his own; B. found them, and kept them, on the ground that the books contained matter injurious to him, and also shewed them to others: A. sent a person to demand them of B.,

who, at first, refused to give them up at all; but, before the person left, said he would not give them to him, but would to C. or D. C. went, and B. offered to give him the letters and one book, which C., after consulting with A., accepted, saying that he made a sacrifice to obtain the letters:—*Held*, that there was a conversion of the whole; but the verdict was only for nominal damages. *Clendon v. Dinneford*, 13

VENDOR AND PURCHASER.

1. In *assumpsit* by vendee against vendor to recover back a deposit paid on the purchase of real property, the defendant at the trial produced (under a notice to produce) the agreement which had been signed at the foot of the conditions of sale:—*Held*, that it was not necessary to call the subscribing witness to prove the execution of this agreement. *Bradshaw v. Bennett*, 48

2. Where, in the particulars of sale, property was stated to be held under the C. estate upon three lives, and it appeared in an action to recover back the deposit, that one of the lives had dropped before the sale, and that the property was not held directly under the C. estate:—*Held*, that the defendant could not call the auctioneer to prove that he stated before the sale that the life had dropped; but that the defendant might give evidence to shew that, before the sale, the plaintiff had read the original lease under which the property was held. *Ibid.*

3. A party recovering back a deposit paid on the purchase of real property is not entitled to interest. *Ibid.*

4. A purchaser at an auction cannot recover from the vendor the expenses of preparing the deeds of conveyance of the property, after he has refused to complete the purchase on account of the non-production of certain title deeds, though his attorney prepared the conveyances on the faith

of a note written in the margin of the abstract by the vendor's solicitors, stating that all the title deeds were examined by them on the original purchase, and that, if it should be required, they would apply to the solicitor for the original seller, in whose custody they were. *Jarmain v. Egelstone*, 172

5. A. having agreed to buy certain lands of B., had paid part of the purchase money, and was let into possession. B. had not executed any conveyance:—*Held*, that this was a mere tenancy at will in A., and that if B. had made a demand of possession to determine the tenancy at will, he might recover the lands by ejectment. *Doe d. Hiatt v. Miller*, 595

UNLAWFUL ASSEMBLY.

See RIOT.

WARRANT.

A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good. *Rex v. Stokes*, 148

WARRANTY.

See FALSE REPRESENTATION.

1. A receipt on the sale of a colt contained the following words after the date, name, and sum, "for a grey four years old colt, warranted sound in every respect:"—*Held*, that such part as related to the age was a representation only, and not a warranty. *Budd v. Fairman*, 78

2. A. sold a picture to B. as a Rembrandt. There was contradictory evidence in an action on an accommodation bill given for the price, as to whether there was a warranty, or only a representation. The picture was kept:—*Held*, that, if the jury thought there was a warranty, and that it was broken, then they

should find their verdict for that sum which they considered to be the actual value of the picture. *De Semhanberg v. Buchanan*, 343

WAY.

See HIGHWAY.

1. If a person opens his land so that the public pass over it continually, they would, after the user of a very few years, be entitled to pass over it and use it as a way, and if the person does not mean to dedicate it as a way, but only to give a license, he should do some act to shew that he gives a license only. The common course is to shut it up one day in the year. *British Museum v. Finnis*, 460

2. If there is an old way near a person's land, and by the fences decaying the public come on the land, that is no dedication of the land as a way. *Ibid.*

WITNESS.

See BAIL, 1.—EVIDENCE, 2, 7, 10, 22.—NEGLIGENCE, 7.—PERJURY, 2.—RELEASE.

1. A defendant's attorney, who has been subpoenaed on the part of the plaintiff, may, at the desire of his counsel, remain in Court during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw. *Everett v. Lowdham*, 91

2. Questions may be put on the *voire dire* to a witness by the party who calls him, in order to shew his competency, though no question has been asked by the opposite counsel to shew a disqualification; the objection being founded on the opening speech. *Perryman v. Steggall*, 197

3. If the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family, cannot be served with a subpoena in consequence of the conduct of that fa-

mily, the bill may be read without his evidence. *Hill v. Phillips*, 356

WRIT OF RIGHT.

On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin. *Jones v. Brearly*, 319

WOUNDING.

1. If a person, for the purpose of accomplishing a robbery, wound, by means of kicking, the skin of the party whom he is endeavouring to rob, he is punishable under the stat. 9 Geo. 4, c. 31, s. 12, if the jury find that his intent was either to disable or do grievous bodily harm. *Rex v. Shadbolt*, 504

2. A game-keeper, accompanied by his assistant, met four poachers on the highway, one carrying a gun, another a gun-barrel, and the other two, bludgeons. There had been previously two shots fired. The game-keeper said to his assistant "Mind the gun," and the assistant laid hold of it, and then the gamekeeper called to another person; upon this three of the poachers knocked him down and stunned him, and when he came to himself he saw all of them near, and one said as they passed him, "D—n them, we have done them both," and one turned back and cut him on the left leg, and all then ran away. It was objected, *first*, that the wounding of the leg was the act of one alone, and there was no evidence to shew which of them it was;—*secondly*, that, from the expressions used, it was evident that both were thought to be dead, and there could be no intent to murder, &c.;—*thirdly*, that the prisoner being on the highway, the gamekeeper and his assistant had no right to interfere with them. The prisoners were convicted, and the Judges held the conviction right. *Rex v. Warner*, 525

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